SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 8, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Saxe, Catterson, Richter, JJ.

5294-
5295-
5296-
5297 Index 401720/05

The People of the State of
New York by Andrew M. Cuomo, etc.,
Plaintiff-Respondent,

-against-

Maurice R. Greenberg, et al.,
Defendants-Appellants.

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The Chamber of Commerce of
The United States of America.
Amicus Curiae.

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Boies, Schiller & Flexner LLP, Cambridge, MA (Charles Fried of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), Boies, Schiller & Flexner LLP, Armonk (David Boies of counsel), and Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., New York (Robert G. Morvillo of counsel), for Maurice R. Greenberg, appellant.

Kaye Scholer LLP, New York (Vincent A. Sama of counsel), for Howard I. Smith, appellant.

Eric T. Schneiderman, Attorney General, New York (Richard Dearing of counsel), for respondent.

Mayer Brown LLP, Washington, DC (Andrew J. Pincus of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 21, 2010, which, to the extent appealed

from, denied defendants Maurice R. Greenberg's and Howard I. Smith's motions for summary judgment dismissing the Martin Act (General Business Law § 352-c[1][a] and [c]) and Executive Law § 63(12) claims as against them, and granted the Attorney General's motion for summary judgment on the issue of liability with respect to one of two challenged transactions, modified, on the law, to deny the Attorney General's motion, and otherwise affirmed, without costs.

Introduction

The Attorney General brought this action against American International Group (AIG), its former CEO (Maurice R. Greenberg) and its former CFO (Howard I. Smith) alleging that defendants violated Executive Law § 63(12) and the Martin Act based upon their role in fraudulent transactions designed to portray an unduly positive picture of AIG's loss reserves and underwriting performance. AIG, formerly the largest insurance company in the world, entered into a settlement agreement with the Attorney General with respect to these and other claims, paying over $1 billion in damages and penalties. The details of the challenged transactions are as follows.

The GenRe Transaction

In the third quarter of 2000, AIG reported that its loss reserves (funds set aside to pay future claims on policies) had

declined by $59 million from the previous quarter, while its net premiums increased by 8.1%. In the industry, this could be viewed as an indication of a company's deteriorating financial condition. In an effort to shore up its loss reserves, Greenberg called Ronald Ferguson, the CEO of General Reinsurance Corporation (GenRe), to discuss the possibility of AIG's entering into a loss portfolio transfer (LPT) involving "finite reinsurance" with GenRe. Greenberg testified at his deposition that he made the call in October 2000, based upon his concerns about AIG's loss reserves. He testified that he remembered inquiring about borrowing some of GenRe's reserves through an LPT. He did not remember the details of the conversation but testified that he told Ferguson that AIG would pay GenRe if it was willing to accommodate the request.

After the conversation, Ferguson designated Richard Napier, a senior GenRe executive, to handle the details from GenRe's end. Greenberg appointed Chris Milton, a senior vice president at AIG and the head of reinsurance, to work out the details for AIG.

Greenberg testified that he had a second telephone conversation with Ferguson in November 2000 and that Ferguson told him that GenRe could provide AIG the product it had requested. Greenberg also testified that he had contemporaneous discussions with Milton and Smith concerning the GenRe

transaction, but denied any knowledge of its fraudulent nature. Smith testified at his deposition that Milton advised him of the general terms of the GenRe deal. The actuaries testified that Smith was responsible for recording the transaction. Moreover, Smith participated in the meeting regarding commuting the GenRe transaction from an LPT to profits. Although AIG's underwriting practices required internal actuarial review of any proposed insurance agreement over $20 million, no underwriting analysis of the GenRe transaction was directed or performed.

The draft contract between AIG and GenRe provided, in general terms, that GenRe would pay AIG $10 million to assume a specified amount of risk, namely $100 million for six to nine months. The premium was $500 million on a 98% funds withheld basis, meaning that GenRe could charge AIG only for losses beyond the $500 million premium (up to a $600 million cap on losses).

The Attorney General alleges that the $100 million loss exposure was illusory, that at least half of the contracts covered by the GenRe transaction had already been reinsured by other carriers and thereby carried no risk to AIG, and that AIG and GenRe had separately agreed that, for accommodating AIG in its request to structure the transaction as no risk, GenRe was paid a $5 million fee, and the $10 million premium payment was secretly returned to GenRe through other, unrelated agreements.

In his deposition in this litigation, Napier testified that the parties "involved" in the separate side deal included Greenberg, Ferguson, and Milton. Greenberg denied knowledge of both the no-risk nature of the GenRe transaction and the side deal concerning the fee and the return of the premium.

According to generally accepted accounting principles, an LPT can only be recorded as loss reserves if the risk insured exceeds a 10% chance of a 10% loss. If, as the parties presently concede, there was no risk of loss in the GenRe transaction, it should have been recorded on AIG's financials as a deposit. Instead, AIG recorded $250 million in loss reserves for the fourth quarter of 2000 based upon the GenRe transaction and an additional $250 million in loss reserves for the first quarter of 2001, consistent with Greenberg's intent when he reached out to Ferguson, to shore up the reserves. Had these amounts not been credited in this manner, AIG would have had a $187 million decline in its loss reserves by the first-quarter of 2001. In a press release regarding AIG's 2001 first-quarter financial picture, Greenberg is quoted as being pleased with a number of favorable financial indicators, including the reversal of the loss reserve declines.

In 2001, 2002, and 2003, Greenberg and Smith certified AIG's 10-K financial disclosure reports with the SEC, each year

recording the $500 million from GenRe as loss reserves. In 2003 and 2004, Greenberg participated in decisions regarding characterizing the GenRe transaction, and, in late 2004, $250 million was commuted to profits.

In early 2005, AIG received subpoenas from the Attorney General and the SEC for information regarding the GenRe transaction. AIG retained outside counsel to perform an internal investigation, and Pricewaterhouse Coopers (PwC), the auditor, initiated an expanded audit to review AIG's prior financials and certain transactions. Barry Winograd, the PwC partner in charge of the audit, testified at his deposition that he had frequent contact with Greenberg throughout the investigation and that Greenberg was particularly interested in PwC's findings with respect to GenRe.

In March 2005, AIG issued a press release admitting that the GenRe transaction documentation was improper, stating that in light of the lack of evidence of risk transfer, the transactions should have been recorded as deposits. Defendants subsequently resigned their positions as CEO and CFO of the company. On May 31, 2005, following defendants' departures from AIG, the company's new management filed AIG's 10-K for 2004, restating the financials submitted from 2000 to 2004. In the restatement, AIG explained that "[GenRe] was done to accommodate a desired

accounting result and did not entail sufficient qualifying risk transfer. As a result, AIG has determined that the transaction(s) should not have been recorded as insurance."

In June 2005, two GenRe executives pleaded guilty to participating in a conspiracy to commit securities fraud for their role in the GenRe transaction. In February 2008, four other GenRe executives were convicted on federal criminal charges with respect to the GenRe transaction. Those convictions were reversed upon evidentiary errors and the case was remanded for a new trial (*see United States v Ferguson*, 553 F Supp 2d 145 [D Conn 2008], *revd* __ F3d __, 2011 WL 6351862, 2011 US App LEXIS 26115 [2011]).

The Capco Transaction

Beginning in the early 1990s, various AIG subsidiaries were writing auto warranty insurance policies. In late 1999, an actuarial consultant retained by AIG concluded that the company was facing an underwriting loss ratio of 265% in this area. At his deposition, Greenberg admitted that AIG's auto warranty business up until the late 1990s "was not handled properly," that he was annoyed about the situation, and that he may have referred to the situation as a "debacle." Greenberg also admitted giving specific instructions to Charles Schader, about reforming the auto warranty business, and testified that he had regular calls

with Schader, and other employees, about his concerns, including on weekends. These calls concerned "everything from ... consultation of outstanding contracts and policies, claims handling, and mitigation of loss."

Greenberg also testified that he directed an internal audit of AIG's auto insurance business to review the auto warranty business and to explore ways to mitigate projected losses. The parties do not dispute the details of the transaction structured to meet these objectives between AIG and Capco Reinsurance Company, Ltd. (CAPCO), an offshore shell company controlled by AIG. AIG, which did not treat CAPCO as a consolidated entity on its financial statements, sold shares in the shell company over time so as to trigger recognition of $162.7 million in capital losses (which the investing public would not deem as significant to the company's financial well-being). The amount corresponded to AIG's payment of over $183 million in underwriting losses.

Both Greenberg and Smith defended their approval of the CAPCO transaction, testifying that Joseph Umansky, the Senior Vice President of AIG, had assured them that it would be structured to properly comply with all legal, accounting, and regulatory guidelines. By contrast, the Attorney General claims that Smith directed Umansky to develop a transaction to convert underwriting losses into capital losses, that both defendants

received an April 2000 memo from Umansky proposing the CAPCO deal, and that Greenberg personally directed Umansky to contact the president of an AIG private bank in Switzerland to locate outside investors to buy the CAPCO common stock. After Greenberg and Smith left the company in 2005, AIG announced that CAPCO involved an improper structure created to characterize underwriting losses relating to the auto warranty business as capital losses.

Procedural History

In September 2009, the Attorney General, Greenberg and Smith all filed motions for summary judgment. The motion court denied Greenberg's and Smith's motions in their entirety. It granted the Attorney General's motion in part, finding that Greenberg and Smith's knowledge and participation in the CAPCO transaction constituted a violation of the Martin Act and Executive Law § 63(12) as a matter of law. Greenberg and Smith each appeal from the denial of their motions and the partial grant of the Attorney General's motion. The Attorney General appeals from the portion of its motion that was denied.

Appellate Contentions

The issues before us include (1) whether the action is preempted by federal law; (2) whether the court properly denied defendants' motions for summary judgment regarding the GenRe

transaction; and (3) whether the court properly granted the Attorney General summary judgment on liability regarding the CAPCO transaction.

Preemption

The Supremacy Clause of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (US Const, art VI, cl 2). This broad language gives Congress the power to supersede State statutory, regulatory and common law (*People v First Am. Corp.*, 18 NY3d 173, 179 [2011]; *Guice v Charles Schwab & Co.*, 89 NY2d 31, 39 [1996], *cert denied* 520 US 1118 [1997]). Preemption can arise by: (i) Congress's express preemption; (ii) Congress establishing a comprehensive regulatory scheme in an area effectively removing the field from the state's realm; or (iii) an irreconcilable conflict between federal and state law (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 113 [2008], *cert denied* 555 US 1136 [2009], citing *Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006]). The United States Supreme Court has instructed that, in determining whether federal law preempts state law, a court's "sole task is to ascertain the intent of Congress" (*California Fed. Sav. & Loan Assn. v Guerra*, 479 US

272, 280 [1987]; *see also Medtronic, Inc. v Lohr*, 518 US 470, 485 [1996] ["(T)he purpose of Congress is the ultimate touchstone in every pre-emption case"] [internal quotation marks omitted]; *Matter of People v Applied Card Sys., Inc.*, 11 NY3d at 113).

Defendants argue that this action is precluded by the express language of Title I of the Securities Litigation Uniform Standards Act of 1998 (SLUSA) (15 USC § 78bb[f][1] and [2]). They also claim that the claims asserted by the Attorney General conflict with Congress's intent to create a uniform federal standard for securities litigation as evidenced by governing securities litigation, namely, the Private Securities Litigation Reform Act of 1995 (PSLRA)(15 USC § 77z-1), the National Securities Markets Improvement Act of 1996 (NSMIA)(15 USC § 77r) and SLUSA, and the cases which construe these statutes. However, nothing in the language or legislative history of the cited legislation indicates Congress intended to preempt this civil enforcement action under the Martin Act and the Executive Law (*People v Applied Card Sys, Inc.*, at 115). In fact, the cited statutes, their legislative histories and the caselaw presuppose an important role for state Attorneys General in investigating fraud and bringing civil actions to enjoin wrongful conduct, vindicate the rights of those injured thereby, deter future fraud, and maintain the public trust.

The NSMIA, codified at 15 USC § 77r(a)(2)(b), expressly preempts any state law that "directly or indirectly prohibit[s], limit[s], or impose[s] any conditions upon the use of ... any proxy statement, report to shareholders, or other disclosure document relating to a covered security" registered under 15 USC § 78o-3.

As the motion court stated, the purpose of NSMIA is to preempt any state Blue Sky Laws that would require the issuers of securities to comply with certain state registration requirements prior to marketing in the state, in recognition of the redundancy and inefficiency of such requirements (*see Zuri-Invest AG v NatWest Fin., Inc.*, 177 F Supp2d 189, 192 [2001]). Accordingly, NSMIA precludes states from imposing their own requirements for disclosure on prospectuses, traditional offering documents, and sales literature relating to covered securities (*id.*).

However, a savings clause in the NSMIA permits states to retain jurisdiction to police fraudulent conduct:

> "Consistent with this section, the securities commission (or any agency or office performing like functions) of any State *shall retain jurisdiction* under the laws of such State to *investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions*" (15 USC § 77r[c][1] [emphasis added]).

The legislative history of NSMIA confirms Congress's intent "not to alter, limit, expand, or otherwise affect in any way any State statutory or common law with respect to fraud or deceit ... in connection with securities or securities transactions" (House Report of Committee on Commerce, HR Rep 104-622, 104th Cong., 2d Sess., 34 [1996], reprinted in 1996 U.S.C.C.A.N. 3877, 3897).

The PSLRA was enacted in 1995 to set uniform federal standards for private plaintiffs seeking to bring actions against issuers of publicly traded securities. Because the PSLRA set heightened pleading standards for cases brought in federal court, the statute had the unintended effect of what Congress termed a "migration" of frivolous class action securities litigations to state court, undermining PSLRA's aim.[1] Accordingly, in 1998, Congress passed SLUSA, which provides, as relevant, that

> "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security"

(15 USC § 78bb[f][1]).

Defendants argue that SLUSA preempts this action because the state Attorney General is seeking, in a de facto representative

[1]www.sec.gov/news/testimony/testarchive/1997/tsty1997.txt.

capacity, to litigate claims on behalf of a "covered class" of AIG investors seeking to recover for their financial losses, in frustration of the legislation's intent to create uniform federal standards for such litigation. However, this is not a shareholder derivative lawsuit, and in fact, there is such an action presently pending in federal court against defendants.[2] Rather, after years of joint federal and state investigation, the Attorney General exercised the discretion of his office to bring this enforcement action pursuant to the Executive Law and the Martin Act, to protect the citizens of this State and the integrity of the securities marketplace in New York, to enjoin allegedly fraudulent practices, and to direct restitution and damages to deter future similar misconduct (*see People v Applied Card Sys.*, 11 NY3d at 109; *People v Bunge Corp.*, 25 NY2d 91, 100 [1969]; *compare Merrill Lynch, Pierce, Fenner & Smith Inc. v Dabit*, 547 US 71 [2006][class action securities litigation]; *Kircher v Putnam Funds Trust*, 547 US 633 [2006] [same]).

Thus, nothing in the federal legislative scheme indicates that Congress intended to preempt this action, and in fact, the cited statutes express the importance of the state's role in

[2]The Attorney General has apprised the federal court of the status of this litigation. Defendants have represented to this Court that a hearing date has been set (June 28, 2012) for approval of class action claims against them.

policing fraud (*see Bunge* at 100). Nor is there any indication that Congress intended to preclude the Attorney General from seeking monetary recovery in order to deter alleged fraudulent conduct (*see People v Coventry First LLC*, 13 NY3d 108, 114 [Attorney General has statutory authority to seek both injunctive and victim specific relief, comparable to the EEOC in the federal arena]; *People v Applied Card Sys. Inc.*, 11 NY3d at 109).

In Re Baldwin-United Corp. (770 F2d 328 [1985]) and *Merrill Lynch Pierce, Fenner & Smith, Inc. v Cavicchia* (311 F Supp 149 [1970]) are two of a number of cases cited by defendants which are distinguishable on their facts. In *Baldwin-United*, 31 states were challenging an injunction precluding them from commencing state law actions for money damages to supplement sums received by the same plaintiffs who had entered into settlement agreements in a number of consolidated class action securities litigations. Here, unlike *Baldwin*, no settlement has been approved in the class action pending in federal court. Further, as stated above, this enforcement action has aims and seeks remedies broader than the restitution sought in *Baldwin*.

Cavicchia involved a statutory interpleader action brought by securities brokers from New York and New Jersey. The plaintiffs sought the transfer of sequestered funds held by the New York State Attorney General to an impartial receiver, so that

the monies could be distributed to defrauded individuals from both states (311 F Supp at 158). The court granted plaintiffs the requested relief, finding no conflict between its order and the sovereign rights of New York's Attorney General under the Eleventh Amendment to the United States Constitution (*id.*). Here, in contrast to *Cavicchia*, the Attorney General's enforcement action is in pretrial motion practice. No trial has been had on either liability or damages, and there are no issues before us regarding competing states' rights.

Accordingly, upon review of the cited federal legislation (NSMIA, PSLRA, SLUSA), the relevant legislative history, and the governing case law, we find no evidence that Congress intended to preempt the Attorney General's Martin Act and Executive Law claims in this action.

State Claims

The Martin Act defines fraud as "any device, scheme or artifice . . . deception, misrepresentation, concealment, suppression, fraud, false pretense or false promise" (General Business Law § 352[1]). Fraud under the Martin Act includes all deceitful practices contrary to the plain rules of common honesty and all acts tending to deceive or mislead the public (*see People v Sala*, 258 AD2d 182, 193 [1999], *affd* 95 NY2d 254 [2000]). Executive Law § 63(12) includes "virtually identical language" to

the Martin Act (*State of New York v Rachmani Corp.*, 71 NY2d 718, 721 n 1 [1988]). Both statutes have been liberally construed to "defeat all unsubstantial and visionary schemes . . . whereby the public is fraudulently exploited" *(People v Federated Radio Corp.*, 244 NY 33, 38 [1926]). The Attorney General need not prove scienter or intent to defraud in a civil claim under either statute (*Rachmani*, 71 NY2d at 725, n.6; *see People v Lexington Sixty-First Assoc.*, 38 NY2d 588, 595 ["the terms 'fraud' and 'fraudulent practices' [are] to be given a wide meaning so as to embrace all deceitful practices contrary to the plain rules of common honesty, including all acts, even though not originating in any actual evil design to perpetrate fraud or injury upon others, which do tend to deceive or mislead"]; *see also People v American Motor Club*, 179 AD2d 277, 283 [1992], *appeal dismissed* 80 NY2d 893 [1992]). However, an essential element of the Attorney General's Martin Act claims is that the alleged fraudulent transactions be material, i.e., that they have more than a trivial effect on net income or shareholder equity (*see*, *TSC Indus., Inc. v Northway, Inc.*, 426 US 438, 449 [1976]).

Officers and directors are liable for a corporation's fraud where they either personally participate in the fraud or have actual notice of its existence (*Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 44 [1980] ["[a] principal that accepts

the benefits of its agent's misdeeds is estopped to deny knowledge of the facts of which the agent was aware"]; *accord People v Apple Health & Sports Clubs*, 80 NY2d 803, 807 [1992]).

Summary Judgment

"Summary judgment permits a party to show, by [admissible evidence], that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law" (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). It is a "drastic remedy" - depriving the parties of a trial, and as such, should only be granted where there is no doubt as to the existence of a triable issue of fact (*see Glick & Goleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). The function of a court in reviewing such a motion is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307, 311 [1972]). Further, where credibility determinations are required, summary judgment must be denied (*see Glick & Goleck,* 22 NY2d at 441).

CPLR 3212(b), which governs the type of proof admissible in support of a motion for summary judgment, allows for consideration of affidavits, the pleadings and other available proof, such as depositions and written admissions (*Andre v*

Pomeroy, 35 NY2d 361 [1974]).[3] This Court has specifically held that witness statements from a Martin Act interview conducted by the Attorney General before an action was brought are admissible in support of a motion for summary judgment (*see State of New York v Metz*, 241 AD2d 192, 198-199 [1998]). Moreover, restatements of earnings have been held admissible under the Federal Rules of Civil Procedure as a business record (see *In re Worldcom, Inc. Sec. Litig.*, 2005 WL 375313, *7, 2005 US Dist LEXIS 2215, *23 [SD NY 2005] ["company's admission of what its financial statements should have been in prior years is highly probative of whether the previously filed documents were false"]).

All of the evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*Branham v Loews Orpheum Cinemas, Inc.,* 8 NY3d 931 [2007]). Further, in opposition to such motion for summary

[3]It bears noting that evidence given at a related criminal trial resulting in a conviction may properly be considered on a motion for summary judgment (*Edmonds v New York City Hous. Auth.*, 224 AD2d 191 [1996]). Here, at the time the motion court issued its decision, a judgment had been rendered in federal district court in Connecticut, convicting a number of individuals from GenRe, and one from AIG, of various felonies. Thus, there was no error in the motion court's consideration of the criminal trial testimony in its ruling. However, as the convictions have been reversed and the criminal matter remanded for a new trial, we confine our review to facts submitted independent of the Connecticut criminal litigation.

judgment, a court can consider hearsay evidence (*see DiGiantomasso v City of New York*, 55 AD3d 502 [2008]; *Matter of New York City Asbestos Litig.*, 7 AD3d 285, 286 [2004] ["evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination"]).

Applying these principles, we find that the record evidence, including the witness-deponents' hearsay testimony submitted by the Attorney General regarding the defendants' actions and statements, presents triable issues of fact as to whether defendants knew of, or participated in the fraudulent aspects of the GenRe and CAPCO schemes, given the nature and degree of their personal involvement in both of the challenged transactions, as well as defendants' responsibilities within the corporation (*see Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]).

With respect to GenRe, Greenberg admits to two relevant phone calls with Ronald Ferguson: the first, initiated by Greenberg, to specifically inquire about an LPT; the second, initiated by Ferguson, to let Greenberg know that the transaction Greenberg had requested could be consummated. Winograd's deposition testimony regarding the degree of Greenberg's interest in the audit of GenRe and his knowledge as to the details of the transaction support the Attorney General's position that

Greenberg was complicit in the illicit scheme. Further, both Smith and Greenberg signed the financial statements that falsely recorded the GenRe money as loss reserves. Greenberg admits that concern about AIG's loss reserves prompted his actions, but he and Smith vehemently deny any knowledge that GenRe was structured not to involve any risk, and both also deny participation in any fraudulent LPT.

With respect to CAPCO, Umansky's Martin Act interview implicates both Greenberg and Smith in the fraudulent characterization of the auto warranty losses as capital losses. Moreover, AIG's restatement of earnings is admissible as a business record (*see Worldcom*, 2005 WL 375313, *6, 2005 US Dist LEXIS 2215, *20) and, in conjunction with the excerpts of the depositions of Greenberg and Smith, supports the Attorney General's position that defendants actively participated in the CAPCO transaction with knowledge of the deceptive purpose it was intended to achieve.

However, given that defendants have submitted sworn denials of knowledge and participation in the CAPCO fraud, and have testified that they were assured by Umansky that the CAPCO deal was structured to comply with all of the applicable legal and regulatory requirements, summary resolution of their knowledge or participation in this alleged fraud cannot be determined as a

matter of law.

In addition, the record presents triable issues of fact as to the materiality of the CAPCO transaction, given the competing evidentiary submissions concerning whether a reasonable investor would have found that the information about a quantitative and qualitative impact of the transaction significantly altered the total mix of information available (*see TSC Indus., Inc. v Northway, Inc.*, 426 US at 449, 450; *State of New York v Rachmani Corp.*, 71 NY2d at 726).

All concur except Catterson, J. who dissents in part and concurs in part in a memorandum as follows:

CATTERSON, J. (dissenting in part and concurring in part)

I am compelled to dissent in part because I believe that the Martin Act and the Executive Law are preempted in this case by federal law. Even if this entire action was not preempted, the defendants Greenberg and Smith are nonetheless entitled to summary judgment dismissing the complaint against them concerning the Gen Re Transaction due to the utter failure of the New York Attorney General (hereinafter referred to as "NYAG") to oppose the defendants' motion with evidence in admissible form or to put forward an excuse for the failure to do so after five years of investigation and discovery. Barring preemption, I concur with the majority that the motion court's grant of summary judgment to the NYAG with regard to the CAPCO Transaction was error as the record contains disputed issues of material fact. We differ however, on the admissibility of certain evidence as well as the validity of the motion court's findings.

In 2006, the NYAG filed an amended complaint charging the defendants Greenberg and Smith, AIG's former CEO and CFO, with violating Executive Law § 63 (12) and General Business Law ("GBL") § 352-c (1) (a) and (c) (hereinafter referred to as the "Martin Act"). See generally People v. Greenberg, 50 A.D.3d 195, 851 N.Y.S.2d 196 (1st Dept. 2008), lv. dismissed, 10 N.Y.3d 894, 861 N.Y.S.2d 266, 891 N.E.2d 299 (2008). The complaint alleged,

among other things, that Greenberg and Smith personally initiated, negotiated and structured two sham reinsurance transactions to portray an unduly positive picture of AIG's loss reserves (hereinafter referred to as the "Gen Re Transaction") and underwriting performance to the investing public (hereinafter referred to as the "CAPCO Transaction").

The Gen Re Transaction

In the fall of 2000, facing investor concern over a large decrease in its "loss reserves" (funds to pay claims on policies), AIG contacted General Reinsurance Corporation ("Gen Re") in order to borrow $200-500 million in reserves through a "loss portfolio" transfer (LPT) transaction. The record discloses that LPTs are a legitimate form of reinsurance. Gen Re was a subsidiary of Berkshire Hathaway. Ostensibly, AIG would reinsure Gen Re for $600 million in potential liability in exchange for $10 million in premiums ceded to AIG. AIG was to pay a $5 million fee to Gen Re. Greenberg spoke directly with Gen Re's CEO, Ronald Ferguson. Greenberg then tasked Christian Milton, AIG's head of reinsurance, to work on the idea of an LPT with Richard Napier, a senior vice president of Gen Re. The NYAG claims that AIG did not bear any risk in the transaction for which it paid Gen Re a $5 million fee; the NYAG thus asserts that the deal should have been booked as a deposit because of its no-

risk structure, but that AIG booked the transaction as insurance, which increased AIG's loss reserves and made it appear to be financially healthier than it was.

On May 31, 2005, following the defendants' departures from AIG, new management filed AIG's Form 10-K for 2004, restating financial statements for 2000 through 2004 (hereinafter referred to as the "Restatement").[1]

The CAPCO Transaction

In 1999, AIG faced large underwriting losses based, in part, on its auto warranty policies. AIG developed a transaction to convert the underwriting losses into capital losses. Under the CAPCO Transaction, AIG "reinsured" the auto warranty underwriting losses through an offshore shell company, CAPCO Reinsurance, that was controlled by AIG. This allowed AIG, which did not treat CAPCO as a consolidated entity on its financial statements, to sell shares in the shell company over time so as to trigger recognition of $162.7 million in capital losses that corresponded

[1] In June 2005, two Gen Re executives pleaded guilty to participating in a conspiracy to commit securities fraud for their role in effectuating the Gen Re Transaction. In February 2008, Milton and three Gen Re executives were convicted on Federal charges with respect to the Gen Re Transaction. Those convictions were subsequently reversed and the matter was remanded for a new trial. See United States v. Ferguson, 553 F.Supp.2d 145 [D. Conn. 2008]; rev'd, __ F.3d __ , 2011 WL 6351862, 2011 U.S. App. LEXIS 26115 (2011).

to its payment of more than $183 million in auto warranty underwriting losses.

After Greenberg and Smith left AIG in 2005, AIG issued a press release and announced that the transaction involved an improper structure created to recharacterize underwriting losses relating to auto warranty business as capital losses.

The Summary Judgment Motions

On September 22, 2009, Greenberg and Smith filed motions for summary judgment seeking to dismiss the claims asserted against them. The defendants argued that they were entitled to summary judgment because, inter alia, the claims were preempted by federal law, and any alleged misstatements or omissions in connection with the transactions were immaterial as a matter of law.

The NYAG filed a motion for partial summary judgment on liability with respect to the Gen Re and CAPCO Transactions. In brief, the NYAG argued that the Gen Re evidence showed that Greenberg: (1) initiated the Gen Re Transaction; (2) designated Christian Milton, the head of AIG reinsurance to work out details and report back to him; (3) agreed to the terms proposed by Gen Re, including an oral side agreement that AIG would not be subject to any risk; and (4) later boasted of the increase in loss reserves that were the result of the transaction. The NYAG

argued that Smith was briefed on the terms of the no-risk deal and directed that it be booked as insurance.

With respect to CAPCO, the NYAG argued that the evidence showed that Greenberg directed AIG to stop writing new auto-warranty policies, that Smith directed AIG Senior Vice President Joseph Umansky to develop a transaction to convert the underwriting losses into capital losses, and both defendants received and approved of Umansky's proposal which was then implemented. Further, the NYAG alleged that Greenberg personally directed Umansky to contact the president of an AIG private bank in Switzerland to locate outside investors to buy the CAPCO common stock.

In opposition to the NYAG's summary judgment motion and in further support of their motions, the defendants first argued that the vast majority of the evidence cited by the NYAG in support of its claims was inadmissible hearsay. This included testimony and evidence from other proceedings, such as the Martin Act interview of Joseph Umansky conducted by the NYAG before the complaint was filed, and the testimony at the federal criminal prosecution in Hartford, Connecticut. The defendants also objected to the NYAG's reliance on certain handwritten notes and e-mails.

The defendants maintained that, based only on the admissible

evidence, there was no support for the claims that they sought improper transactions or knew that they were improper. The defendants argued that based on the admissible record, the claims had to be dismissed because there was insufficient evidence to sustain a claim with respect to their participation in the transactions or knowledge that they involved no risk. At the very least, they argued that issues of fact precluded the grant of the NYAG's summary judgment motion.

With respect to the Gen Re Transaction, the defendants argued that the admissible evidence shows that while Greenberg contacted Gen Re to inquire about an LPT, it was solely AIG and Gen Re personnel, without the involvement of Greenberg or Smith, who worked on all the details of the transaction. This included the accounting decisions and anything else relating to the execution of transaction.

With respect to the CAPCO Transaction, the defendants argued that the admissible evidence, at minimum, raises disputed issues of fact as to their participation in or knowledge of the alleged improper nature of the transaction. The defendants cite the involvement of numerous legal and accounting professionals. The professional staff were charged with addressing all of the legal, regulatory and tax issues associated with the CAPCO Transaction. The defendants also relied upon such professionals to draft

controlling documents and ensure that the transaction was proper and accounted for accurately.

The court denied the defendants' motions for summary judgment to dismiss the claims, and granted NYAG's motion for partial summary judgment on the issue of liability with respect to the CAPCO Transaction, but denied it with respect to the Gen Re Transaction.

Preemption

In my view, use of the Martin Act and the Executive Law in the context of alleged securities violations is, in this case, preempted by federal law. It is beyond dispute that the national market for securities requires the certainty of uniform standards. Guice v. Charles Schwab & Co., 89 N.Y.2d 31, 45-46, 651 N.Y.S.2d 352, 359, 674 N.E.2d 282, 289 (1996), cert. denied, 520 U.S. 1118, 117 S.Ct. 1250 (1997). In order to achieve this uniformity, Congress enacted a series of regulatory schemes that control the national securities markets.

In the Private Securities Litigation Reform Act of 1995 (hereinafter referred to as "PSLRA") (15 U.S.C. § 77z-1, as added by Pub. L. 104-67, 109 U.S. Stat. 737), Congress specified the standards under which private litigants may bring suits against securities issuers. Less than three years later, recognizing that litigants were circumventing the PSLRA by invoking state-law

causes of action, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (hereinafter referred to as "SLUSA") (15 U.S.C. § 77p and § 78bb, as added by Pub. L. 105-353, 112 U.S. Stat. 3227), which explicitly precludes state law actions premised on allegations relating to securities transactions. Finally, through the National Securities Markets Improvement Act of 1996 (hereinafter referred to as "NSMIA") (15 U.S.C. § 77r, as added by Pub. L. 104-290, 110 U.S. Stat. 3416), Congress preempted the vast majority of so-called Blue Sky laws, which had imposed a multiplicity of state law registration standards on securities issuers.

NSMIA rests on Congress's recognition that uniformity of regulations concerning nationally traded securities "promote[s] efficiency, competition, and capital formation in the capital markets," and "advance[s] the development of national securities markets . . . by, as a general rule, designating the Federal government as the exclusive regulator" of national securities markets. House Report of Committee on Commerce, H.R. Rep. No. 104-622, 104th Cong., 2d Sess., at 16 (1996), reprinted in 1996 U.S.C.C.A.N. at 3877, 3878. More recently the Supreme Court succinctly explained that "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be

overstated." Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 78, 126 S.Ct. 1503, 1509, 164 L.Ed.2d 179 (2006).

When PSLRA, SLUSA and NSMIA are read together it is patent that the Congress has determined that efficient securities markets require a uniform national standard governing liability for private class actions. See Lander v. Hartford Life & Annuity Ins. Co., 251 F.3d 101, 111 (2d Cir. 2001). Thus, any effort to circumvent that uniform federal scheme is barred by these federal statutes.

In this case, and as set out infra, the NYAG has instituted a lawsuit for the benefit of private parties. The NYAG has made clear in recent filings in parallel federal securities litigation regarding the exact same conduct (litigation that is unquestionably subject to the PSLRA), that the only relief that essentially is at issue here is an award of damages for a worldwide class of AIG shareholders.

It is hornbook law that "state and local laws that conflict with federal law are 'without effect.'" New York SMSA Ltd. Partnership v. Town of Clarkstown, 612 F.3d 97, 103 (2d Cir. 2010)(per curiam), quoting Altria Group Inc. v. Good, 555 U.S. 70, 76, 129 S.Ct. 538, 543 (2008). We have recognized two kinds of preemption relevant to the NYAG's claims: "express preemption,

where Congress has expressly preempted local law," and "conflict preemption, where local law is an obstacle to the achievement of federal objectives." New York SMSA Ltd. Partnership, 612 F.3d at 104, citing Wachovia Bank, N.A. v. Burke, 414 F.3d 305, 313 (2d Cir. 2005); see also Guice, 89 N.Y.2d at 39, 651 N.Y.S.2d at 355. Express and implied preemption each independently require dismissal of the NYAG's claims against Greenberg and Smith.

Federal law bars this action for two reasons. First, because this action is brought by the NYAG on behalf of private shareholders, it is indistinguishable from a private class action. Thus, it is precluded by SLUSA's express textual prohibition of class actions grounded in state law; in this case the Martin Act and the Executive Law. Second, taken together, the PSLRA, SLUSA and NSMIA impliedly preempt any litigation that seeks recovery of damages on a class basis for securities fraud under purely state law.

The U.S. Supreme Court has held that SLUSA prohibits suits, such as this one, which are advanced under state law alleging misrepresentations in connection with nationally traded securities "in which damages are sought on behalf of more than 50 people." Kircher v. Putnam Funds Trust, 547 U.S. 633, 637, 126 S.Ct. 2145, 2151 (2006). Kircher directs that state courts dismiss actions falling within this preclusion of SLUSA and

failure to do so is subject to review by the United States Supreme Court. See 547 U.S. at 646-648, 126 S.Ct. at 2156-2157.

There is no dispute that the NYAG seeks monetary damages on behalf of a class of private shareholders. Indeed, the NYAG advised the federal court before whom the investors' consolidated securities class action is pending that the NYAG action seeks damages on "overlapping facts" for the same "class members." The NYAG here is not invoking the Martin Act and Executive Law to seek remedies limited to sovereign interests, but is seeking to bring an action impermissibly "in a de facto or de jure representative capacity on behalf of [the private shareholders]." See e.g., In re Baldwin-United Corp., 770 F.2d 328, 341 (2d Cir. 1985). Such "de facto or de jure" actions on behalf of private shareholders are barred by federal law and dismissal is required. See Kircher, 547 U.S. at 646-648, 126 S.Ct. at 2156-2157.

NSMIA further prohibits states from "directly or indirectly" imposing different disclosure requirements than federal law. 15 U.S.C. § 77r(a)(2)(B). Federal law requires a showing of scienter and reliance for securities fraud claims – elements that the NYAG and the court below assert are not required in this case. Accordingly the NYAG's action also conflicts with and is barred by NSMIA. See Myers v. Merrill Lynch & Co., 1999 WL 696082, *9, 1999 U.S. Dist. LEXIS 22642, *30 (N.D. Cal. 1999),

aff'd, 249 F.3d 1087 (9th Cir. 2001).

The NYAG's goal of recovering damages against Greenberg and Smith on behalf of private investors without having to show scienter is in direct conflict with federal law, which requires such proof in actions involving allegations of fraud. See e.g., Marcus v. AT&T Corp., 138 F.3d 46 (2d Cir. 1998). This would allow the NYAG to recover damages on behalf of private investors on a quantum of proof significantly lower than under federal law.

> "The prospect is raised then, of parallel class actions proceeding in state and federal court, with different standards governing claims asserted on identical facts. That prospect, which exists to some extent in this very case, squarely conflicts with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 86-87, 126 S.Ct. 1503, 1514 (2006) (citation omitted); accord Guice v. Charles Schwab & Co., 89 N.Y.2d at 48, 651 N.Y.S.2d at 361.

The defendants contend that this direct conflict could only be obviated if requirements of scienter and reliance were imposed with respect to claims seeking the recovery of monetary damages on behalf of private shareholders under the Martin Act and Executive Law. I agree and would reverse on this ground.

Unfortunately, merely holding the NYAG to a higher standard of proof for the claims asserted in this case will not render the

NYAG's prosecution more viable. We have repeatedly held that there are limitations on the power of the NYAG to prosecute claims for money damages on behalf of private entities. Our decision in People v. Grasso, 54 A.D.3d 180, 861 N.Y.S.2d 627 (1st Dept. 2008), is instructive in this regard. In Grasso, we rejected the NYAG's continued prosecution of claims made on behalf of an entity that had altered its status from a not-for-profit corporation to a for-profit entity. "The Attorney General's continued prosecution of these causes of action . . . vindicates no public purpose." 54 A.D.3d at 196, 861 N.Y.S.2d at 641, citing People v. Ingersoll, 58 N.Y. 1 (1874) and People v. Lowe, 117 N.Y. 175, 22 N.E. 1016 (1889). Our reliance on Ingersoll has particular significance for this case. In Ingersoll, the NYAG attempted to recover money for a municipal corporation from certain defendants. The Court rejected the NYAG's parens patriae argument:

> "It is not in terms averred that the money, in any legal sense or in equity and good conscience, belonged to the [State] . . ., or that the wrong was perpetrated directly against the State or the people of the State, that is, the whole State as a legal entity, and the whole body of the people . . . The title to and ownership of the money sought to be recovered must determine the right of action, and if the money did not belong to the State, but did belong to some other body

> having capacity to sue, this action cannot be maintained." 58 N.Y. at 12-13; see New York v. Seneci, 817 F.2d 1015 (2d Cir. 1987).

In my view, private shareholders who have cause to complain have no need of the NYAG to protect their rights. There simply is no wrong committed "directly against the State or the people of the State" as required by Ingersoll, Lowe and Grasso. Indeed, a class of shareholders has actively litigated claims against AIG in a consolidated securities class action. This action has resulted in a settlement in excess of $1 billion with a contribution of over $100 million from Greenberg and Smith. See In re American Intl. Group Sec. Litig., No. 1:04 CV 08141 (S.D.N.Y. 2004). The NYAG's use of the Martin Act and the Executive Law on behalf of private shareholders should be summarily rejected for the same reasons that we rejected the NYAG's efforts under the Not-For-Profit Corporations Law in Grasso.

Even if the action is not preempted by federal law, or precluded by the State Constitution, the motion court erred in not awarding the defendants summary judgment on the Gen Re Transaction claims. It is beyond dispute that the party moving for summary judgment must make out a prima facie showing of entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986).

Once the movant has made out a prima facie entitlement to summary judgment, a party opposing the motion must submit proof in admissible form demonstrating a genuine issue of material fact or proffer a reasonable excuse for the failure to do so. Alvarez, 68 N.Y.2d at 324, 508 N.Y.S.2d at 925; see Grasso v. Angerami, 79 N.Y.2d 813, 580 N.Y.S.2d 178, 588 N.E.2d 76 (1991); Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 598, 404 N.E.2d 718, 720 (1980); Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065, 1068, 416 N.Y.S.2d 790, 792, 390 N.E.2d 298, 299 [1979]); Vasquez v. Christian Herald Assn., 186 A.D.2d 467, 468, 588 N.Y.S.2d 291, 292 (1st Dept. 1992), lv. dismissed 81 N.Y.2d 783, 594 N.Y.S.2d 719, 610 N.E.2d 392 (1993).

Greenberg and the Gen Re Transaction

In order to hold Greenberg liable for fraud in connection with the Gen Re Transaction, the NYAG was obligated to establish that Greenberg either participated in or had knowledge of the fraud itself. In my view, New York law clearly provides that a corporate officer's knowledge of just the transaction itself is insufficient. Marine Midland Bank v. Russo Produce Co., 50 N.Y.2d 31, 44, 427 N.Y.S.2d 961, 968-969, 405 N.E.2d 205, 212 (1980) (citations omitted) ("As a general proposition, corporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual

knowledge of it . . . Mere negligent failure to acquire knowledge of the falsehood is insufficient."); see Polonetsky v. Better Homes Depot, 97 N.Y.2d 46, 735 N.Y.S.2d 479, 760 N.E.2d 1274 (2001); People v. Apple Health & Sports Clubs, 80 N.Y.2d 803, 587 N.Y.S.2d 279, 599 N.E.2d 683 (1992).

The NYAG's theory is that the Gen Re Transaction was fraudulent because it had "no transfer of risk" and thus could not have been carried as insurance under generally accepted accounting principles. Even if that contention is correct, the NYAG simply offers no admissible evidence to rebut Greenberg's prima facie showing that Greenberg did not know that at the time AIG entered into the Gen Re LPT, the LPT did not transfer sufficient risk to be properly accounted for as a finite reinsurance LPT. The only proof of record that is admissible establishes that Greenberg had knowledge of the transaction, a matter that Greenberg does not dispute, but not knowledge of any fraud. More importantly, the NYAG also failed to offer any admissible evidence that the transaction was without risk. The only evidence put forth by the NYAG on this aspect was AIG's 2005 press release and its Restatement.

Defendant Greenberg contends, and I agree, that the Restatement is nothing more than inadmissible hearsay. There is no evidence of record as to how the Restatement was created, how

the facts that it was purportedly based on were established, or even that it was created from evidence generally considered reliable. Most significantly, it was issued after Greenberg left AIG and at a time when then Attorney General Spitzer was threatening AIG with criminal prosecution. Similarly, the press release has absolutely no probative value, and, just as any newspaper article based on that press release, would be inadmissible hearsay.

The only remaining evidence relied on by the NYAG and accepted by the motion court either contravenes CPLR 4517(a), or is simply inadmissible hearsay. No court in New York has ever allowed hearsay to be sufficient to defeat a summary judgment motion where that hearsay evidence cannot ultimately be converted to admissible evidence at trial.

In my view the reason for this is elementary. There would be no reason to deny summary judgment to a party where the only evidence in opposition to the motion could never be admitted at a subsequent trial. The motion court failed to elucidate how the testimony from the Hartford criminal trial, with its now reversed convictions, would be admissible in a trial of this action. Moreover, when pressed at oral argument on appeal, the NYAG was similarly bereft of authority on this critical issue for the AG’s case.

The record reflects that the motion court and the NYAG relied on the Hartford trial judge's opinion on matters at issue as well as the trial testimony of AIG personnel who were either not deposed in this case, or if deposed, no mention was made of the EBT testimony. Furthermore, as noted above, the convictions were ultimately vacated.

The NYAG and the motion court relied on testimony that will always remain inadmissible: 1) the Hartford trial judge's rulings on issues of, inter alia, the credibility of Napier's testimony in the Hartford trial, and as to the damage to AIG investors; 2) the testimony of John Houldsworth in the Hartford trial, who was not deposed in the instant case; 3) the testimony of Charlene Hamrah (the director of AIG's investor relations department) in the Hartford trial and not her EBT testimony; and 4) three other employees of AIG who also testified in the criminal trial.

Equally disturbing is the motion court's reliance on AIG's settlement with the Securities and Exchange Commission and the NYAG as well as Gen Re's settlement with the SEC and the United States Department of Justice. Again, no authority exists to allow the introduction of these settlements, in which the defendants took no role, as evidence in opposition to the motion. Finally, and in my view, astonishingly, the motion court even considered a book written by a former AIG employee when deciding

what defendant Greenberg knew about Milton's actions.

None of the above-described "evidence" relied on by the motion court is rendered admissible through invocation of the co-conspirator exception. In People v. Sanders (56 N.Y.2d 51, 451 N.Y.S.2d 30, 436 N.E.2d 480 (1982)), the Court was faced with the question of whether certain recorded conversations with a person deceased at the time of trial were admissible against the defendant. The Court reviewed the extent of the co-conspirator exception to the hearsay rule and concluded by holding that, "the People must establish, by prima facie proof, the existence of a conspiracy between the declarant and the defendant 'without recourse to the declarations sought to be introduced.'" 56 N.Y.2d at 62, 451 N.Y.S.2d at 35, quoting People v. Salko, 47 N.Y.2d 230, 238, 417 N.Y.S.2d 894, 899, 391 N.E.2d 976, 981 (1979). In my view, none of the evidence cited by the court below was non-hearsay, independent evidence of the existence of a conspiracy.

On appeal, the NYAG contends that "Greenberg's own testimony is sufficient to establish a prima facie case of conspiracy." This assertion is wholly belied by the record. Greenberg testified repeatedly that his understanding of the Gen Re Transaction was that it was a valid, and thus lawful, LPT. To overcome this deficiency in proof, the motion court relied on

Napier's Hartford criminal trial testimony that Greenberg agreed to a no risk deal. Unfortunately for this reasoning, Napier also testified that he never spoke with Greenberg, was himself a participant in the transaction, and based his assertions on what he heard from third parties. Once again, none of this testimony satisfies any exception to the hearsay rule. Therefore, Napier's testimony in the Hartford criminal trial cannot, by definition, satisfy the Sanders requirement of non-hearsay independent evidence. Finally, in reversing the convictions, the Second Circuit cautioned the government over the allegations that Napier perjured himself: "No doubt it is dangerous for prosecutors to ignore serious red flags that a witness is lying, and the government will doubtless approach Napier's revised recollections with a more skeptical eye on remand." __ F.3d at __, 2011 WL 6351862, *14, 2011 U.S. App. LEXIS 26115, *48. Such testimony surely cannot serve to make the NYAG's prima facie burden.

Smith and the Gen Re Transaction

The NYAG's utter failure to submit admissible evidence in opposition to Greenberg's summary judgment motion is less egregious than its failure to submit such in opposing Smith's motion. No witness testified that Smith was responsible for accounting for the Gen Re Transaction. Indeed, no witness testified that they even spoke with Smith about the transaction.

While Smith, as AIG's CFO, may have had involvement in certain transactions between Hartford Steam Boiler and Gen Re, Smith unequivocally testified in his EBT that he was not aware of either the details of the Gen Re Transaction or that any premium was returned to Gen Re. Smith testified repeatedly that he was told that the transaction involved $500 million in premium and a potential exposure of $600 million. In his view, the transaction involved $100 million in risk to AIG. The reasons set forth above for rejecting any of the Hartford trial testimony as evidence against Greenberg apply equally to Smith. The testimony will always be inadmissible in this case and can never be used to defeat Smith's motion.

Greenberg, Smith, and the CAPCO Transaction

The majority contends that the evidence put forward by the NYAG shows that the "defendants actively participated in the CAPCO [T]ransaction with knowledge of the deceptive purpose it was intended to achieve." This view of the evidence is only possible if we disregard all of the accepted principles applicable to summary judgment motions.

It is hornbook law that "issue finding and not issue resolution is a court's proper function on a motion for summary judgment." Cruz v. American Export Lines, 67 N.Y.2d 1, 13, 499 N.Y.S.2d 30, 36, 489 N.E.2d 1042, 1048 (1986), cert. denied, 476

U.S. 1170, 106 S.Ct. 2892, 90 L.E.2d 979 (1986); Shapiro v. Boulevard Hous. Corp., 70 A.D.3d 474, 475, 895 N.Y.S.2d 53, 53 (1st Dept. 2010). Furthermore, the court is required to draw all inferences in favor of the nonmovant. Id.; People v. Grasso, 50 A.D.3d 535, 544, 858 N.Y.S.2d 23, 32 (1st Dept. 2008). Finally, in the context of summary judgment, the court is not to assess the credibility of the assertions of each side, but rather decide if the movant who has the burden has established "his entitlement to summary judgment as a matter of law." Ferrante v. American Lung Assn., 90 N.Y.2d 623, 631, 665 N.Y.S.2d 25, 30, 687 N.E.2d 1308, 1313 (1997); Adam v. Cutner & Rathkopf, 238 A.D.2d 234, 656 N.Y.S.2d 753 (1st Dept. 1997).

In my view the motion court and the majority have ignored every precept set out above to come to the conclusion that the defendants intended the CAPCO Transaction to be a mere deception. Initially, there is absolutely no record support for the motion court or the NYAG to conclude that the conversion of underwriting losses to capital losses is prima facie improper.

The defendants established that Greenberg repeatedly testified in his EBT that he understood it was permissible to "convert underwriting [losses] properly into investment losses, and that [it] could only be done if [...] checked by the regulatory, legal, and accounting people." ("Umansky . . . said

subject to getting approval from the regulatory side, the legal side, the accounting side . . . [t]here was nothing improper about converting underwriting losses to investment losses"). The defendants also submitted unrebutted expert opinion evidence establishing that a "change from an underwriting loss to a capital loss is not, in and of itself, improper pursuant to GAAP." The NYAG failed to submit any countervailing evidence. Indeed, the NYAG failed to proffer any expert testimony at all in reply to Greenberg's opposition to the motion. Obviously, the credibility of the nonmovant defendants' expert submitted in opposition cannot be resolved adversely to Greenberg, nor his opinions completely ignored, by the motion court. This is especially true when the NYAG submitted no contravening proof. Cf., Bradley v. Soundview Healthcenter, 4 A.D.3d 194, 194, 772 N.Y.S.2d 56, 57 (1st Dept. 2004) ("Conflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment").

Greenberg's understanding of the merits of the transaction in theory was corroborated by the numerous professionals, both lawyers and accountants, who ultimately structured the CAPCO Transaction for AIG. None of these professionals raised any concerns regarding the propriety of exiting the auto-warranty business through a transaction that also converted the

underwriting losses to capital losses. Indeed, the record is unequivocal that at least eight AIG attorneys, including Ernest Patrikis, AIG's General Counsel, and Ken Harkins, the General Counsel of AIG's Domestic Brokerage Group, which was responsible for National Union, understood that the CAPCO Transaction converted underwriting losses to capital losses. Numerous AIG accountants, including reinsurance accounting experts, also understood that the CAPCO Transaction converted underwriting losses to investment losses. Last, but not least, AIG's independent auditors, PricewaterhouseCoopers, also were aware of the CAPCO Transaction.

Greenberg accurately points out that none of these professionals raised any concerns that such a transaction would be per se improper because it resulted in the conversion of underwriting losses to capital losses. Several attorneys involved testified they were familiar with similar transactions. At the very least, where the conduct is consistent with industry practice, summary judgment is "particularly" inappropriate. State of New York v. General Motors Corp., 48 N.Y.2d 836, 838, 424 N.Y.S.2d 345, 346, 400 N.E.2d 287, 288 (1979).

In sum, the record is directly contrary to the majority's and the motion court's inference that converting an underwriting loss to a capital loss is, per se, a deceptive or wrongful act.

The further inference that Greenberg must, therefore, have known that the CAPCO Transaction was deceptive is also in direct conflict with the record. Finally, even if I were to agree that such inferences were arguably "reasonable," it would nonetheless be impermissible to grant summary judgment to the moving party upon reasonable but not "inescapable" inferences. Liberty Ins. Underwriters Inc. v. Corpina Piergrossi Overzat & Klar LLP, 78 A.D.3d 602, 605, 913 N.Y.S.2d 31, 34 (1st Dept. 2010).

I concur with the majority that if the claims are not preempted by federal law, the motion court erred nonetheless because issues of fact exist solely on the question of the materiality of the CAPCO Transaction.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4715 ERC 16W Limited Partnership, Index 600870/09
Plaintiff-Appellant,

-against-

Xanadu Mezz Holdings LLC, et al.,
Defendants-Respondents.

Kasowitz, Benson, Torres & Friedman, LLP, New York (Sheron Korpus of counsel), for appellant.

Allen & Overy LLP, New York (Jacob S. Pultman of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered September 27, 2010, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the first four causes of action, modified, on the law, to deny the motion as to the first, second and fourth causes of action, and otherwise affirmed, with costs to plaintiff.

Plaintiff ERC 16W Limited Partnership (ERC) is the borrower under a $1.015 billion "Construction Loan Agreement," dated March 30, 2007 (hereinafter, the loan agreement), intended to finance the development of the Meadowlands Sports Complex in East Rutherford, New Jersey. Defendant Xanadu Mezz Holdings LLC (XMH) was not one of the "Lenders" that was originally a party to the entire loan agreement. Rather, XMH was a "Closing Date Participant," meaning that it was assigned a participation

interest in the loan pursuant to a participation agreement, also dated March 30, 2007, to which ERC is not a party. As a closing date participant, XMH executed the loan agreement (as stated over its signature thereto) "for the sole purpose of acknowledging its agreement to Sections 2.9.2(e), (f) and (g) and Section 2.11" thereof.

In the first cause of action of the amended verified complaint, ERC asserts a claim against XMH for breach of the loan agreement based on XMH's failure to fund its ratable portion of advances on the loan that were called for in January, February, March and April of 2009. Supreme Court granted XMH's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), holding, with regard to the first cause of action, that the portions of the loan agreement to which XMH was a party — the aforementioned sections 2.9.2(e), (f) and (g) and section 2.11 — did not obligate XMH to fund the loan.[1] The court agreed with XMH that any obligation XMH had to fund the loan arose solely from the participation agreement, to which ERC was not a party and which expressly precludes the construction of any of its provisions as "be[ing] for the benefit of or enforceable by any Person not a party hereto."

[1]The remaining causes of action at issue on this appeal are discussed later in this writing.

On ERC's appeal, we determine, as a matter of law, that the provisions of the loan agreement to which XMH is a party unambiguously create a contractual obligation running from XMH to ERC to fund advances on the loan. The first of these provisions, section 2.9.2(e), provides in pertinent part: "Borrower [ERC] agrees that *for purposes of funding Advances hereunder and funding any Deficiencies*, the Lender holding the $485MM Note shall not be responsible for funding its Ratable Share of each Advance; instead, *each Closing Date Participant shall be treated in the same manner as each Lender, with each such Closing Date Participant holding a Ratable Share equal to its Closing Date Participant Share and a Maximum Commitment equal to its Closing Date Participant Maximum Commitment*, and the provisions of Sections 2.9[.]2(f) and (g) below shall govern the failure of any Closing Date Participant to fund its Closing Date Participant Ratable Share of any Advance on the Requested Advance Date" (emphasis added). The requirement that each participant "be treated in the same manner as each Lender" with regard to, inter alia, its "Closing Date Participant Maximum Commitment" — a term defined by the loan agreement to mean the participant's "*obligation* . . . to fund Advances of the Loan to Borrower" (emphasis added) — can only mean that each closing date participant is obligated to fund advances on the loan to the

extent of its interest. Stated otherwise, the use in section 2.9.2(e) of the defined term "Closing Date Participant Maximum Commitment" incorporates by reference the statement in the definition of that term that a closing date participant has an "obligation . . . to fund Advances of the Loan to Borrower."

It does not follow from the foregoing conclusion that a closing date participant assumed all of the obligations of a "Lender" set forth in the loan agreement. The requirement of section 2.9.2(e) that a participant "be treated in the same manner as each Lender" is modified immediately thereafter by the provision setting forth the portion of each advance for which each closing date participant is responsible; hence, a participant is to "be treated in the same manner as [a] Lender" only for purposes of the obligation to fund advances on the loan. This is confirmed by the phrase "for purposes of funding Advances hereunder and funding any Deficiencies" in the opening clause of the sentence, which naturally modifies the sentence as a whole. Also unavailing is XMH's argument that the phrase "Borrower [ERC] agrees" at the beginning of the sentence implies that the sentence creates obligations on the part of ERC alone; XMH, in executing the loan agreement as a closing date participant, expressly "acknowledg[ed] its agreement to Section[] 2.9.2(e)," meaning all provisions of that subsection. Moreover, the opening

phrase “Borrower agrees” merely reflects that only ERC, as borrower, could agree to release a lender from its promise to fund the loan, but other provisions referenced in the sentence involved rights and obligations of all parties, including the closing date participants.

Also pertinent is section 2.9.2(f), which provides in pertinent part: “If and to the extent that any Closing Date Participant (the ‘Defaulting Closing Date Participant’) shall not have made available to Agent [under the loan agreement] on the Requested Advance Date its Closing Date Participant Ratable Share of any Advance . . . , Agent shall notify the Lenders, the other Closing Date Participants and Borrower *of such default*. Each of the Closing Date Participants agrees that *Borrower* [ERC], Agent or any of the other Closing Date Participants *shall have the right to proceed directly against any Defaulting Closing Date Participant in respect of any right or claim arising out of the default of such Defaulting Closing Date Participant hereunder*” (emphasis added). The first of the two sentences just quoted establishes that a closing date participant’s failure to fund an advance due on the loan in accordance with its “Closing Date Participant Ratable Share” (a term defined to mean “the percentage that such Closing Date Participant’s Maximum Commitment then constitutes of the Maximum Commitment of the

holder of the $485MM Note") constitutes a "default." Plainly, failing to fund the loan could constitute a "default" only if the closing date participant is obligated to provide such funding. The next sentence provides that ERC, as borrower, has "the right to proceed directly against any Defaulting Closing Date Participant in respect of any right or claim arising out of . . . [its] default . . . hereunder." Again, the natural implication of the language is that failing to fund the loan is a "default" under this very provision.

XMH argues that the language entitling ERC "to proceed directly against any Defaulting Closing Date Participant" extends "only to the exclusive remedies provided in Sections 2.9.2(e), (f), (g), and 2.11" (meaning, in substance, termination and transfer of the defaulting participant's interest and its indemnification of the agent, lenders, and other closing date participants). This construction is not tenable. The contractual remedies to which XMH refers (and which the loan agreement itself does not characterize as "exclusive") are primarily for the benefit of parties other than the borrower, yet the borrower is expressly afforded "the right to proceed directly against [the] Defaulting Closing Date Participant." If these sophisticated parties had intended, at the same time they agreed that ERC would "have the right to proceed directly against any

Defaulting Closing Date Participant," to bar ERC from seeking the aid of the courts to require a defaulting participant to honor its obligation to fund the loan under sections 2.9.2(e) and (f), they would have expressly so provided.

The dissent asserts that the provision of section 2.9.2(f) entitling ERC, as borrower, to "proceed directly" against a defaulting closing date participant means nothing more than that ERC may "obtain an Eligible Assignee to replace [the] Defaulting Closing Date Participant" as provided in section 2.9.2(g). Specifically, the dissent takes the position that the only way in which ERC is entitled to "proceed directly" against a defaulting closing date participant is to enforce its right to require the defaulting participant to assign its interest to an eligible assignee. Obviously, this right is of little use in the event a willing and eligible assignee cannot be found, as appears to be the case here. In any event, we reject this counterintuitive reading of the loan agreement.

The dissent does not explain how one can tell that the provision of section 2.9.2(f) permitting ERC to "proceed directly" against a defaulting closing date participant means only that ERC may force an assignment to a substitute for the defaulting participant; no such limitation is expressed in section 2.9.2(f). Again, the relevant sentence of section

2.9.2(f) states: "Each of the Closing Date Participants agrees that Borrower, Agent or any of the Other Closing Date Participants shall have the right to proceed directly against any Defaulting Closing Date Participant in respect of any right or claim arising out of the default of such Defaulting Closing Date Participant." As previously discussed, section 2.9.2(e) — to which each closing date participants is a party — gives rise to an obligation, owed by each closing date participant to the borrower, to fund its assigned portion of the loan. It follows that the failure of a closing date participant to provide such funding when due constitutes a breach of contract subjecting it to a "claim [by the borrower] arising out of [the closing date participant's] default," on which claim the borrower may "proceed directly" against the defaulting closing date participant. Given that XMH was directly obligated to ERC to fund its portion of the loan, we see nothing in the governing documents that compels, or even supports, the dissent's narrow reading of ERC's "right to proceed directly" against XMH.

At bottom, the position of XMH and the dissent that ERC cannot state a claim for breach of contract based on XMH's default in meeting its loan-funding obligation rests on the premise that we should look beyond the actual governing provisions of the loan agreement and assume that this deal was a

typical loan syndication. Both parties agree that, in the typical loan syndication, there is no direct contractual relationship between the borrower and loan participants who have been assigned their interests by the lender with which the borrower contracted; the contracting lender remains obligated to the borrower for the full amount of its commitment, regardless of any assignment of participatory interests. The written agreements documenting this transaction establish that this is not what occurred here. In specified provisions of the loan agreement to which XMH made itself a party, ERC excused the lenders with which it contracted from responsibility for funding the portions of the loan assigned to participants (as provided in section 2.9.2[e]) and, at the same time, received the right to proceed directly against such participants in the event they defaulted (as provided in section 2.9.2[f]).

Even if the contractual provisions at issue could be described as ambiguous on the issue of ERC's right to sue XMH for failing to fund its portion of the loan — and, for the reasons already discussed, we conclude that no such ambiguity exists — we would reject the construction of the relevant sections of the loan agreement advocated by XMH and the dissent. That proposed construction — under which ERC supposedly agreed (in a departure from usual practice) to excuse the contracting lender from its

obligation to fund assigned portions of the loan but received in exchange no right to compel the assignees (such as XMH) to honor their funding commitments — would essentially place ERC at the mercy of a defaulting assignee for which no substitute could be found. The unfairness and commercial unreasonableness of depriving ERC of the ability to compel any party to come forth with the promised financing would be compounded by ERC's obligation under the loan agreement to fund itself any deficiency in the financing not cured within 60 days. In the absence of express language compelling such a harsh result, we find this construction untenable as a matter of law. It is a longstanding principle of New York law that a construction of a contract that would give one party an unfair and unreasonable advantage over the other, or that would place one party at the mercy of the other, should, if at all possible, be avoided (*see Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438 [1994]; *see also Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [2010] ["a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties"] [internal quotation marks and citation omitted]; *HGCD Retail Servs., LLC v 44-45 Broadway Realty Co.*, 37 AD3d 43, 49-50 [2006] [same]).

We reject the dissent's position that denying ERC any remedy

for XMH's default, in the absence of language unambiguously barring such a remedy, would not be a "harsh result." It appears to be the dissent's view that ERC, in the belief that participation in the loan would remain as attractive to lenders in the future as it was at closing in 2007, decided to assume the risk that a defaulting loan participant could not be replaced. Initially, it should be noted that this appeal arises from a motion addressed to the pleadings, not one for summary judgment; CPLR 3211 gives no warrant for dismissing a complaint based on a transaction's economic and commercial background even if such conditions are attested by evidence in the record, which they are not here. More fundamentally, as should be evident from our discussion up to this point, we see no evidence in the governing documents for the dissent's theory that a sophisticated party such as ERC threw caution to the wind and agreed to leave itself without a remedy in the event no substitute could be found for a loan participant that failed to honor its commitment. Obviously, the loan's rate of return and other terms, no matter how

favorable, could not guarantee that participation in the project would continue to be attractive to potential lenders; general economic conditions and a borrower's creditworthiness are, needless to say, subject to change.

It seems to us that, to the extent the dissent is accurate in asserting that XMH received a "high rate of return" for participating in the loan, XMH assumed the risk that, if the economic climate worsened, lending money to ERC might be a less attractive proposition at the time an advance of funds became due. Even if the relevant contractual provisions were somehow ambiguous (and they are not), we would decline to relieve XMH of this inherent risk in the deal it made. By the same token, we would decline to impose on ERC the risk that would arise from having no remedy against a loan participant that dishonors its commitment and for which no substitute can be found. Again, section 2.9.2(f) of the loan agreement affords ERC "the right to proceed directly against any Defaulting Closing Date Participant in respect of any right or claim arising out of [its] default," and nothing in the relevant contractual provisions suggests that this "right to proceed" does not include a lawsuit for breach of contract.

The first cause of action also survives the motion to dismiss based on ERC's alternative theory that XMH became a

"Lender" under the loan agreement — and thus was bound by the obligation of a "Lender" under that agreement to fund the loan — through a post-closing assignment that was not fully disclosed to ERC. While ERC was not provided with a copy of a post-closing assignment, it has pleaded sufficient facts circumstantially suggesting that such an assignment took place to require denial of the motion to dismiss, on which all reasonable inferences must be drawn in favor of the pleader. On November 10, 2008, following XMH's default in funding, the parties to the loan agreement and the participation agreement executed a "Cure and Reinstatement Agreement" (the cure agreement), the preamble to which refers to certain post-closing transfers and assignments among the lenders and/or closing date participants. Exhibit A to the cure agreement, setting forth the revised holdings of the parties after the transfers, identifies XMH as both a "Lender" and a "Closing Date Participant." In addition, in separate correspondence dated after the execution of the cure agreement, both XMH's counsel and the agent for the lenders referred to XMH as a "Lender." In view of this circumstantial evidence that a change in XMH's status under the loan agreement occurred, ERC is entitled to pursue discovery on that question.

The second cause of action alleges breach of the cure agreement. While the cure agreement expressly provides that it

reaffirms, without expanding, XMH"s preexisting obligations under the loan agreement and the participation agreement, a breach of those preexisting obligations would constitute a breach of the cure agreement, as well. Accordingly, the second cause of action should not have been dismissed.

The third cause of action, for breach of the implied covenant of good faith and fair dealing, is duplicative of the first and second causes of action, for breach of the loan agreement and the cure agreement, respectively, which we are reinstating. Accordingly, we do not disturb the dismissal of the third cause of action (*see AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568-569 [2009]).

The fourth cause of action alleges breach of contract by defendant Lehman Brothers Real Estate Mezzanine Partners, L.P. (Lehman), which "guarantee[d] the obligations of [XMH], including, without limitation, its Future Funding Obligations under the Participation Agreement." The participation agreement defines the term "Future Funding Obligation" as "the obligation of each Holder [defined as the holder of a participation interest, including XMH] to make future advances under and in accordance with the terms of this Agreement and *the Construction Loan Agreement* up to such Holder's Maximum Commitment" (emphasis

added).[2] Thus, by its terms, Lehman's guarantee covers, not only XMH's obligations under the participation agreement (to which ERC was not a party), but also XMH's funding obligations under the loan agreement (to which ERC was a party). Accordingly, the fourth cause of action should not have been dismissed.

All concur except Catterson, J. who dissents in part in a memorandum as follows:

[2]We note that this definition confirms that the parties to the participation agreement understood that XMH, as a closing date participant, had an obligation under *both* the participation agreement and the loan agreement to fund its ratable portion of advances on the loan.

CATTERSON, J. (dissenting in part)

Because, in my opinion, the majority misapprehends the basic premise of participation interest lending, I must respectfully dissent. In my view, the loan agreement imposes no funding obligation such as would give rise to a breach of contract action in the event of a default by Xanadu Mezz Holdings LLC (hereinafter referred to as "XMH"). It is undisputed that XMH did not agree to section 2.9.2(a) which is the section that imposes contractual funding obligations on the lenders, but not on the closing date participants. The four sections of the loan agreement to which XMH did agree are, in my opinion, unambiguous as to XMH's status and its rights and obligations as a closing date participant. Moreover, the provisions unequivocally circumscribe any action that ERC may take against a defaulting closing date participant like XMH.

Section 2.9.2(e) contains the provision that failure to fund by a closing date participant is governed explicitly by sections 2.9.2(f) and (g). In my opinion, the majority clearly misreads the rights of the borrower arising out of those provisions: While 2.9.2(f) states that the borrower, and agent or any other closing date participant may "proceed directly" against a defaulting closing date participant, such action in the borrower's case is limited, as section 2.9.2(g) makes clear, to "obtain [ing] an

[e]ligible [a]ssignee to replace [d]efaulting [c]losing [d]ate [p]articipant." As set forth more fully below, it is clear that those rights do not include the right to commence a breach of contract action directly against a defaulting closing date participant.

The majority's view that the provisions as interpreted in this dissent would compel a "harsh result" appears to be based on the flawed premise that ERC would be placed "at the mercy of a defaulting assignee for which no substitute could be found." The loan agreement barely contemplates such a situation. On the contrary, section 2.9.2(f) characterizes the opportunity for any other closing date participant to advance the defaulting participant's ratable share as *a right*.

In my opinion, the majority's position is a result of viewing this action through the prism of the current harsh economic climate. The majority therefore fails to see that in 2007 (when the monthly LIBOR rate was more than 5%) loan participation in a commercial development such as Xanadu would have been a highly sought after opportunity comparable, at that time, to the opportunity of investing with a consistently successful high yield private fund, e.g. Bernie Madoff. Hence, the sophisticated parties in this complex commercial deal which ostensibly promised a high return on investment actively sought

out this opportunity. Any scenario involving a situation where ERC would be unable to find a substitute investor would necessarily have been part of the risk of the opportunity, offset by the high rate of return.

The facts of record are as follows: On March 30, 2007, plaintiff, ERC 16 W Limited Partnership (hereinafter referred to as "ERC"), the developer of a sports, leisure, entertainment and shopping complex at the Meadowlands Sports Complex in East Rutherford, New Jersey, entered into a $1.015 billion construction loan agreement with a group of lenders and closing date participants. The loan agreement's preamble defined Lender/Lenders as follows: "the lenders identified on the signature pages hereof (such lenders, together with their respective successors and assigns, individually a 'Lender', and collectively the 'Lenders'"). Pursuant to section 2.9.2(a) which states, "[l]enders *shall make* the requested Advance," (emphasis added) only the lenders have an obligation to fund. The entities who signed the agreement as lenders were Capmark Finance Inc., who was also designated as the agent, Capmark Bank, Column Financial, Inc., and NRFC WA Holdings, LLC.

The loan was evidenced by promissory notes issued by ERC in favor of the four lenders including one to Column in the amount of $485 million. On the same date, Column entered into a

participation and servicing agreement with Capmark Finance whereby Column created four participation interests in the $485 million note. Column was the initial participation holder of all four participation interests.

Also on the same day, Column assigned to XMH one of the participation interests, that being the "junior participation interest" described as "subordinate" to the other three participation interests. Pursuant to the assignment and assumption agreement, Column assigned its obligations as a participation holder to XMH in the amount of $208 million. ERC was not a signatory to either the participation agreement or the assignment and assumption agreement.

XMH joined Capmark Finance and Column to sign the loan agreement as closing date participants, each "for the sole purpose of acknowledging its agreement to Sections 2.9.2(e), (f) and (g) and Section 2.11 of this Agreement." XMH was the only closing date participant which, on May 30, 2007 was not also a lender.

Subsequently, XMH, at the agent's instruction, funded ERC on the first eight requested advance dates between December 2007 and September 2008 for a total of approximately $60 million. In October 2008, following a Chapter 11 filing by Lehman Brothers, XMH did not fund a requested $7 million pro rata portion of the

advance. Again, in November 2008 it failed to fund a requested pro rata share of $8 million.

On November 10, 2008, ERC, XMH, and the other lenders and closing date participants entered into a cure agreement whereby XMH agreed to cure the October and November 2008 deficiencies. It also ratified and reaffirmed all of its covenants, agreements, and obligations under the loan agreement, the participation agreement, and the assumption agreement. The cure agreement specifically provided that it was not intended to "expand" any preexisting obligation.

XMH cured its deficiencies, and subsequently funded its pro-rata share of the December 2008 advance request which brought its total payments to ERC to approximately $84 million as of December 31, 2008. However, on the next advance due date of January 2, 2009, XMH did not fund the requested pro-rata share of more than $8 million. Capmark, as agent, served a notice of default on XMH on January 7, 2009. Neither XMH nor Lehman REM (a guarantor under a separate agreement with XMH) took steps to cure the default.

On or about February 24, 2009, Capmark, as agent, demanded that, pursuant to § 2.9.2 of the loan agreement, ERC fund XMH's deficiencies pending the replacement of XMH by a new lender or loan participant. Thereafter, to keep the project moving

forward, ERC again paid deficiencies to cover two further advances requested of, but not funded by XMH, in March 2009 and April 2009. However, a replacement lender/participant was never obtained, given the economic times and difficult lending market.

In early 2009, ERC commenced the instant action against XMH and Lehman REM for, inter alia, breach of contract. It subsequently filed an amended complaint alleging that XMH's obligations as a lender arose out of section 2.9.2(e) and were incorporated by reference by one of the definitions contained in this section. The motion court dismissed the amended complaint on the grounds "that [XMH] is not a party to the contractual provisions of which [p]laintiff alleges a breach."

In my opinion, the motion court was correct. It is not disputed that the only agreement signed by both ERC and XMH is the loan agreement, and that XMH specifically agreed to only four sections. It is further undisputed that sections 2.9.2(a) and 2.1, which impose contractual funding obligations exclusively on the lenders, were not among the sections to which XMH agreed. Of the four sections in the loan agreement agreed to by XMH, section 2.9.2(e) provides, in relevant part, that:

> "Borrower agrees that for purposes of funding Advances hereunder and funding any Deficiencies, the Lender holding the $485MM Note shall not be responsible for funding its Ratable Share of each Advance; instead, each Closing Date Participant shall be treated in the

> same manner as each Lender, with each such Closing Date Participant holding a Ratable Share equal to its Closing Date Participant Share and a Maximum Commitment equal to its Closing Date Participant Maximum Commitment, and *the provisions of Section 2.9.2(f) and (g) below shall govern the failure of any Closing Date Participant to fund its Closing Date Participant Ratable Share* of any Advance on the Requested Advance Date ...” (emphasis added).

As a threshold matter, it should be noted that, at oral argument, ERC’s counsel agreed that the phrase “instead, each closing date participant shall be treated in the same manner as each lender” did not turn closing day participants into lenders for every provision of the 172-page loan agreement. Certainly, they are not so treated as to rights and remedies. Section 2.12 specifically states, in relevant part, that each closing date participant agrees that “it shall have no rights or remedies under or relating to this [a]greement . . . other than those which are directly related to [the four] sections of this [a]greement.”

ERC argues instead that, because XMH agreed to be “treated in the same manner as each [l]ender” in section 2.9.2.(e), the funding obligation sections (2.9.2(a) and 2.1) are incorporated by reference. Therefore, ERC argues, XMH is contractually obligated to fund the loan advances.

In my opinion, ERC’s argument is unpersuasive and self-serving. Nor does the selection of just two sections, rather

than all sections referring to lenders, make sense under basic rules of contract construction. On the contrary, it begs the question as to why such a fundamental obligation to directly fund was not simply added to the list of sections as a plainly stated provision agreed to by XMH.

In any event, to accept ERC's argument that the phrase "treated in the same manner as each [l]ender" turns closing date participants into lenders for funding obligation purposes would render meaningless the other sections of the loan agreement to which XMH agreed. See e.g. Bailey v. Fish & Neave, 8 N.Y.3d 523, 528, 837 N.Y.S.2d 600, 603, 868 N.E.2d 956, 959 (2007) ("agreements should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases"); see also Acme Supply Co. v. City of New York, 39 A.D.3d 331, 332, 834 N.Y.S.2d 142, 143 (1st Dept. 2007), lv. denied, 12 N.Y.3d 701, 876 N.y.S.2d 349, 904 N.E.2d 504 (2000) (internal quotation marks omitted) ("an interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation.")

Section 2.9.2(e) explicitly negates any suggestion that closing date participants have a contractual obligation to fund the advances in the same manner as lenders, because it states that the "[b]orrower agrees [...] the *provisions of Section 2.9.*

2(f) and *(g)* *below shall govern the failure of any Closing Day Participant to fund its Closing Day Participant Ratable Share of any Advance*" (emphasis added). Moreover, those sections together with section 2.11 deal solely with the available rights, remedies and procedures to be followed in the event of a failure to fund by a closing date participant. They do not include the borrower's right to commence an action for breach of contract directly against a closing date participant. Instead, they provide for different actions to be taken at different stages of a default not only by ERC, but by the lenders, agent and other closing date participants.

Sections 2.9.2(f) and (g) provide for a 60-day period from the request for an advance during which other closing day participants have the *right*, but not obligation, to step in and fund a closing day participant's deficiency; if no such "[e]lecting [c]losing [d]ate [p]articipant" comes forward, subject to certain limitations, the non-defaulting closing date participants "shall fund the . . . [d]eficiency." However, during the same "said sixty (60) day period" the borrower and/or agent have the right (arising out of the default) to use "commercially reasonable efforts" to obtain an eligible replacement assignee. Hence, in my view, the plain meaning of "proceed[ing] directly" is that the borrower need not wait 60

days for any or all other closing date participants to replace the defaulter. At this point, the borrower has the right, pursuant to section 2.11, by giving written notice, "to elect to cause the [defaulting] [c]losing [d]ate [p]articipant ... to assign its [p]articipation . . . to one or more [e]ligible [a]ssignees." If, after 60 days, no other closing date participant or eligible assignee is found, only then is ERC as the borrower obligated to repay the non-defaulting closing date participants, if any, who funded the deficiency and to fund future deficiencies.

ERC's alternative claim that XMH breached the loan agreement as a lender, is also, in my opinion, not sufficiently supported in the record, notwithstanding the description of XMH as a "lender and closing date participant" in one of attached documents to the cure agreement. I agree with XMH that ERC is clutching at a proverbial straw in making this argument since the exhibit, which is not initialed or signed, is the only document where XMH is so identified. The cure agreement to which it is attached clearly states that the reaffirmations of XMH's preexisting obligations are "not intended to expand, and shall not be construed as expanding, in any respect, the scope any of (sic) said covenants, agreements or obligations of [XMH] ... under the Loan Agreement, the Participation Agreement, the

[Assignment and Assumption Agreement] . . . or the Subparticipation Agreement." Moreover, XMH signed the cure agreement only as a "Subparticipation B Party" not as a lender.

Nor does the one-page assignment and assumption agreement make XMH a lender subject to all the terms of the loan agreement despite the preamble in the loan agreement that the agreement binds ERC and the lenders and their "successors and assigns." In this case, the assignment to XMH was of a participation interest, the creation of which is governed by an agreement to which ERC was not a signatory. Moreover, section 10.23 of the loan agreement draws a clear distinction between assigns of interest in the loan by the original lenders (governed by section 10.23 (b)), and the assigns of participation interests by participation holders (governed by 10.23(e)(ii) and 10.23(h)).

For all the foregoing reasons, I believe the decision of the motion court should be affirmed in its entirety.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5456 Rosemary Maniscalco, Index 113043/09
Plaintiff-Respondent-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants-Respondents.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellants-respondents.

Morton Buckvar, New York (Brandon J. Walters of counsel), for respondent-appellant.

Order, Supreme Court, New York County (George J. Silver, J.), entered June 23, 2010, which granted plaintiff's motion for summary judgment as to liability and directed that the damages trial encompass the issue of plaintiff's fault, modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

Although plaintiff presented uncontroverted evidence that the defendant driver negligently failed to yield the right-of-way in a pedestrian crosswalk, the record also raises — as the dissent acknowledges — a triable issue concerning plaintiff's comparative fault. The Court of Appeals held in *Thoma v Ronai* (82 NY2d 736 [1993], *affg* 189 AD2d 635 [1993]) that, even where the record establishes the defendant's negligence, the plaintiff is not entitled to summary judgment as to liability where a

question of comparative fault must be resolved at trial. Although a different panel of this Court declined to follow *Thoma* in *Tselebis v Ryder Truck Rental, Inc.* (72 AD3d 198 [2010]), the *Thoma* holding is recognized and followed by the Second Department (*see Roman v A1 Limousine, Inc.*, 76 AD3d 552 [2010]) and, very recently, by yet another panel of this Court in *Calcano v Rodriguez* (91 AD3d 468 [2012]).[1] While *Thoma* mandates the modification of the order appealed from to deny plaintiff's motion for summary judgment as to liability, we affirm the order insofar as it directs that there be a trial of the issue of comparative fault.

The dissent cannot reconcile its result with the Court of Appeals' holding in *Thoma* by pointing to the fact that the briefs in that case used the outdated term "contributory negligence" when discussing the issue of the plaintiff's fault. The comparative fault regime of article 14-A of the CPLR (enacted by L 1975, ch 69) was the law in 1993 as it is today, and, in deciding the case, both the Court of Appeals (82 NY2d at 737) and this Court (189 AD2d at 636) referred to the issue as one of "comparative negligence." Nothing in these decisions or in the parties' briefs indicates that either the courts or the parties

[1]*Calcano* was recently cited as valid precedent by another panel of this Court in *Wein v Robinson* (92 AD3d 578 [2012]).

contemplated bringing back to life the by-then long-dead "contributory negligence" regime, under which a claimant was totally barred from recovery if his or her own negligence contributed to the causation of the injury. That the parties in *Thoma* did not cite article 14-A or CPLR 1411 indicates only that in that case, as in this one, there was no dispute as to the applicability of the comparative fault regime. As on the instant appeal, the only dispute at issue on the appeal in *Thoma* was whether the plaintiff was entitled to summary judgment as to liability.[2]

It does not avail the dissent to defend its position on the ground that, to win summary judgment as to liability, a plaintiff must show both that the defendant was negligent and that such negligence was a substantial factor in causing the injury. The point of *Thoma* and its progeny is that, where there is evidence that both the defendant and the plaintiff were negligent and that

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[2]The statement approving the *Tselebis* holding in *Gonzalez v ARC Interior Constr.* (83 AD3d 418, 419 [2011]) concerned an issue that was not before the Court on that appeal. In *Gonzalez*, it was the plaintiff, not the defendants, who took an appeal from an order that, while granting the plaintiff summary judgment as to liability, directed that the damages trial encompass the issue of comparative fault. Since the *Gonzalez* defendants had not filed a notice of appeal, we would not have had the power to grant them affirmative relief on this issue even if they had requested it (*see e.g. 61 W. 62 Owners Corp. v CGM EMP LLC*, 16 NY3d 822, 823 n [2011]; *Hecht v City of New York*, 60 NY2d 57, 61-62 [1983]).

each one's negligence may have been a substantial factor in causing the injury, whether one party's negligence was a substantial factor in causing the injury should not be determined in isolation. Rather, each party's "liability should be considered and determined simultaneously with the material, and overlapping, issue of whether the [other party] was also culpable" (*Tann v Herlands*, 224 AD2d 230, 230-231 [1996]). Stated otherwise, in determining whether one party's conduct was a legal cause of the injury, the possible causal role of the other party's conduct should also be considered.[3]

We fail to see how our position is "at odds" with the hornbook principle that to establish a prima facie case, "the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Notably, in the quoted statement from *Derdiarian* (a decision on an appeal from a judgment based on a jury verdict that resolved any issue as to the plaintiff's fault), the Court of Appeals was describing the plaintiff's burden to establish a prima facie case

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[3]The dissent's position finds no support in the four decisions it cites in which we affirmed or granted summary judgment for the plaintiffs in cases arising from rear-end collisions. In none of those cases was there any evidence that the plaintiff bore any share of the fault for the defendant's rear-ending of his or her vehicle.

at trial, not the showing required for granting a plaintiff summary judgment as to liability. On this appeal, the question is, where there is evidence in the pretrial record that more than one party's negligence may have caused the injury, is it appropriate for a court to rule as a matter of law that one of those parties caused the injury? Under *Thoma*, the answer to this question is "no."

Given *Thoma*'s holding that, in a case like this one, the causal role of each party's conduct should not be determined in isolation, CPLR 3212(e) (which was also on the books when *Thoma* was decided) has no bearing on the disposition of this appeal. We note that the concurrence in *Calcano* took the position that a plaintiff unable to eliminate an issue as to comparative fault may be granted summary judgment solely on the issue of the defendant's negligence, but not as to liability, which requires a determination on causation (*see* 91 AD3d at 472 [Catterson, J., concurring]). As noted by the *Calcano* majority, this approach is also inconsistent with *Thoma* and, moreover, would "presumably entail[] a highly confusing jury instruction, [while] not yield[ing] any significant benefit in terms of judicial economy or fairness to the parties" (*id.* at 470).

Finally, the dissent's reliance on *Soto v New York City Tr. Auth.* (6 NY3d 487 [2006]) and on a number of recent Second

Department decisions is misplaced; none of those precedents supports the dissent's position on the issue presented by this appeal, either expressly or by implication (*see Soto*, 6 NY3d at 491 [describing the jury verdict allocating fault on which the judgment being affirmed was based]; *Mikelinich v Caliandro*, 87 AD3d 99 [2011] [denying a motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7); summary judgment for the plaintiff was not at issue]; *Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 145, 151 [2011] [affirming summary judgment as to liability for the plaintiff where, although the defendant "asserted that there were issues of fact as to . . . comparative negligence," inter alia, "(i)n opposition to the plaintiff's (motion), the (defendant) failed to raise a triable issue of fact"]; *Stanford v Dushey*, 71 AD3d 988, 988 [2010] [affirming summary judgment as to liability for the plaintiff where "the defendants' contention that the plaintiff may have been speeding or may have been negligent . . . was speculative" and "the defendants failed to establish that additional discovery would yield any facts indicating that the plaintiff was at fault and justify the denial of the plaintiff's motion"]).

It is with great reluctance that we decline to follow our recent precedent in *Tselebis*, although, at this point, the dissent is not following our even more recent precedent of

Calcano. The pertinent point, we believe, is that *Tselebis* is inconsistent with *Thoma*. As things now stand, differing panels of this Court have reached divergent conclusions on this issue. The question obviously calls for resolution by the Court of Appeals.

All concur except DeGrasse, J. who dissents in part in a memorandum as follows:

DeGRASSE, J. (dissenting in part).

The issue on this appeal is whether, under CPLR 1411, comparative negligence has any bearing on a defendant's liability in a negligence action. The question should be answered in the negative for the reasons set forth below.

Plaintiff, a pedestrian, was struck by the side-view mirror on the driver side of defendants' van as she crossed an intersection within a crosswalk with the light in her favor. Defendant Stokes, the operator of the van, was making a left turn when the accident occurred. The motion court correctly granted plaintiff's motion for summary judgment, finding no issue of fact as to whether Stokes was negligent in failing to yield the right of way and whether his negligence was a substantial factor in bringing about the accident (*see e.g. Gonzalez v ARC Interior Constr.*, 83 AD3d 418 [2011]). On this appeal, defendants do not challenge the court's findings that Stokes was negligent and that his negligence was a proximate cause of the accident. Instead, defendants argue that Stokes's failure to yield the right of way is not determinative of the issue of his negligence and that questions of fact regarding the pedestrian-plaintiff's negligence preclude summary judgment. We should reject defendants' argument and adhere to our decision in *Tselebis v Ryder Truck Rental, Inc.* (72 AD3d 198 [2010]), holding that under CPLR 1411 a plaintiff's

culpable conduct is not a bar to recovery in an action for personal injury.

CPLR 1411 was enacted in 1975 (L 1975, ch 69). The statute provides that in an action to recover damages for personal injury, the culpable conduct attributable to the claimant or decedent "shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages." Before CPLR 1411 became law, a plaintiff's contributory negligence stood as a complete bar to recovery in a negligence action (*see e.g. Behm v Seaman*, 45 AD2d 673 [1974]; *Toporovsky v Reul*, 41 AD2d 734 [1973]). The statute thus abrogated the common-law rule that barred a plaintiff from recovery in tort if he or she was responsible to any degree for the injury sued upon (*Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 394 [2010]). In practical terms, a typical jury or a court sitting without a jury would be called upon to determine whether (a) a defendant was negligent and, if so, (b) whether that negligence was a substantial factor in bringing about an accident (*see e.g. Sheehan v City of New York*, 40 NY2d 496, 501 [1976]). It is beyond cavil that, subject to the application of Insurance Law § 5104, affirmative responses to both questions would establish

liability as a matter of law. Nevertheless, in disregard of CPLR 1411, the majority holds that plaintiff is not entitled to summary judgment because there is a question of her comparative fault. Here the majority clings to a vestige of the common-law effect of contributory negligence that the statute was enacted to avoid.

I acknowledge that my position here and this Court's holding in *Tselebis* cannot be reconciled with *Thoma v Ronai* (189 AD2d 635 [1993], *affd* 82 NY2d 736 [1993]), as well as *Tann v Herlands* (224 AD2d 230 [1996]), which the majority cites for the proposition that freedom from comparative negligence is still a required component of a plaintiff's prima facie showing on a motion for summary judgment. However, we can take judicial notice of the briefs filed in *Thoma* (*Matter of Khatibi v Weill*, 8 AD3d 485 [2004]). As disclosed by those briefs, the appeals in *Thoma* did not involve the effect of CPLR 1411. Rather, the relevant appellate argument in *Thoma* was confined to whether the record contained evidence sufficient to support a finding of contributory negligence. By contrast, in this case, the statute was cited by the court below and is discussed in the parties' briefs. Accordingly, issues that are now before this Court were not before us or the Court of Appeals in *Thoma.*

Tann involved a motor vehicle accident in which the

defendant's vehicle struck the plaintiff's in the rear. The motion court granted the plaintiff's motion for partial summary judgment as to defendant's liability "to the extent of finding defendant driver at least partially at fault in causing the accident" (224 AD2d at 230). This Court modified to deny the motion in its entirety. With no discussion of CPLR 1411, we stated that the defendants' liability should have been considered with the "material, and overlapping, issue of whether the plaintiff was also culpable" (*id.* at 230-231). Like *Thoma, Tann* cannot be reconciled with CPLR 1411, which provides that a plaintiff's possible comparative negligence has no bearing on liability. Moreover, *Tann* is not consonant with more recent decisions of this Court deciding summary judgment motions by plaintiffs under materially indistinguishable facts involving rear-end collisions. For example, in *De La Cruz v Ock Wee Leong* (16 AD3d 199 [2005]) and *Jean v Zong Hai Xu* (288 AD2d 62 [2001]), we affirmed orders granting the respective plaintiffs' motions for summary judgment on the issue of liability. On the other hand, in *Cabrera v Rodriguez* (72 AD3d 553 [2010]) and *Agramonte v City of New York* (288 AD2d 75 [2001]), we reversed orders denying the plaintiffs' motions for similar relief under analogous facts. The overarching principle in these four rear-end collision cases is that "a rear-end collision with a stopped vehicle establishes

a prima facie case of negligence on part of the driver of the rear vehicle" (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008] [internal quotation marks omitted]). The similarly controlling principle at work here is that prima facie entitlement to summary judgment on the issue of liability is established by evidence that a driver failed to yield the right of way to a pedestrian lawfully proceeding across a roadway in a crosswalk (*see Sulaiman v Thomas*, 54 AD3d 751 [2008]).

Our holdings in this case and *Tselebis* are consistent with the reasoning employed by the Court of Appeals in *Soto v New York City Tr. Auth.* (6 NY3d 487 [2006]). The *Soto* Court reviewed a jury verdict in an action brought by a subway patron who was struck by a subway train while he was running alongside tracks between stations. In applying CPLR 1411 to sustain the verdict, by which the Transit Authority was found to be 25% liable, the *Soto* Court held:

> "Plaintiff's conduct was undeniably reckless, but the jury appropriately considered plaintiff's actions and determined that he bore a far greater share of the fault. This is in keeping with the doctrine of comparative negligence (*see* CPLR 1411). Contrary to NYCTA's argument and the dissent, plaintiff's conduct, although a substantial factor in causing the accident, was not so egregious or unforeseeable that it must be deemed a superseding cause of the accident absolving defendant of liability" (*id.* at 492).

Although *Soto* did not involve a motion for summary judgment, its

reasoning firmly supports our holding that under CPLR 1411 comparative negligence is irrelevant to the issue of liability because it is no longer a complete bar to recovery. By contrast, the application of *Thoma* to the facts of *Soto* would have required a dismissal of the complaint, a result the Court did not reach.

The majority in this case also relies on *Roman v A1 Limousine, Inc.* (76 AD3d 552 [2010]), in which the Second Department disagreed with *Tselebis* and held that a plaintiff's failure to establish freedom from comparative negligence required denial of his motion for summary judgment on liability. In reaching its conclusion, the Second Department reasoned as follows: "CPLR 1411 pertains to the damages ultimately recoverable by a plaintiff. It has no bearing, procedurally or substantively, upon a plaintiff's burden of proof as the proponent of a motion for summary judgment on the issue of liability" (*id.* at 553). On its face, the quoted analysis boils down to another way of saying that comparative negligence is irrelevant to liability - the very point of *Tselebis.* The majority's reasoning in this case cannot be reconciled with *Gonzalez* (83 AD3d at 419), in which a panel of this Court unanimously held that *Tselebis* was controlling insofar as the plaintiff was entitled to summary judgment on the issue of liability despite the existence of issues of fact with respect to

her own culpable conduct.

It should be noted that the Second Department has implicitly followed *Tselebis* on more than one occasion both before and after *Roman* was handed down. For example, in *Nash v Port Wash. Union Free School Dist.* (83 AD3d 136, 145 [2011]), the Court made note of the fact that the school district "asserted that there were issues of fact as to whether the plaintiff's comparative negligence contributed to his injuries." Had the Court applied *Thoma, Roman* or even *Tann,* it would have been required to consider the issue of the plaintiff's comparative negligence in determining the appeal. Instead, without even addressing the claim of comparative negligence, the Court affirmed the grant of summary judgment on the issue of liability, holding that

> "the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that the school district breached its duty to exercise the level of care as would a parent of ordinary prudence in comparable circumstances, and that this failure was a proximate cause of the plaintiff's injuries" (*id.* at 151).

Consistent with CPLR 1411 and our reasoning in *Tselebis, Nash* can be readily cited for the proposition that a plaintiff *need not* demonstrate freedom from comparative negligence to be granted summary judgment in a negligence action. As another example, in *Mikelinich v Caliandro* (87 AD3d 99 [2011]), the Second Department cited CPLR 1411 in holding that "even if the

plaintiff's conduct in jumping in front of [an all-terrain vehicle] was found to be negligent, it would not bar his recovery, but only reduce the amount of his recoverable damages in proportion to his fault" (*id.* at 105; *see also Stanford v Dushey*, 71 AD3d 988 [2010] [plaintiff's prima facie entitlement to judgment as a matter of law on the issue of liability was established by evidence that defendant driver failed to yield the right-of-way as plaintiff proceeded lawfully through an intersection]).

The majority also relies on *Calcano v Rodriguez* (91 AD3d 468 [2012]), in which the majority of another panel of this Court followed *Thoma* and *Roman*, adopting the reasoning of both. The concurrence in *Calcano* posits that *Tselebis* was incorrectly decided because it "assumes that in any action where a defendant is found negligent as a matter of law, his or her negligence will be, a priori, a substantial factor in the plaintiff's injuries" (*id.* at 471). This is a misconstruction of our holding. Quite to the contrary, in *Tselebis*, we emphasized that "[t]o establish a prima facie case, a plaintiff 'must generally show that the defendant's negligence was *a substantial cause* of the events which produced the injury'" (72 AD3d at 200, quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], and adding emphasis). The *Calcano* concurrence also maintains that *Tselebis*

cannot stand because "the issues of fact raised by the plaintiff's possible culpable conduct in this case will necessarily impact the answer as to whether the defendant's negligence as a matter of law was *the substantial cause* of the plaintiff's injuries" (*Calcano,* 91 AD3d at 472 [emphasis added]). This reasoning is flawed because, as set forth above, under *Derdiarian*, a plaintiff's burden is to establish that a defendant's negligence was a substantial factor as opposed to the substantial factor in causing an injury (*Derdiarian*, 51 NY2d at 315). The majority in this case takes the position that "in determining whether one party's conduct was a legal cause of the injury, the possible causal role of the other party's conduct should also be considered." This view is similarly at odds with the *Derdiarian* holding quoted above. The majority explains its position by noting that *Derdiarian* involved a trial as opposed to a motion for summary judgment. This explanation reveals a fundamental difference between my analysis and the majority's. In my view, the elements of a cause of action, i.e., the requirements of a prima facie showing, do not vary according to whether there is a trial or a motion for summary judgment. After all, summary judgment is the procedural equivalent of a trial (*Dykeman v Heht*, 52 AD3d 767, 769 [2008]).

In addition, CPLR 3212(e) provides that, except in a

matrimonial action, "summary judgment may be granted as to one or more causes of action, or part thereof, in favor of one or more parties, to the extent warranted, on such terms as may be just." The statute enables a court to isolate and grant summary judgment on an element of a cause of action or an aspect of a prima facie showing. Even if plaintiff had to show her own freedom from negligence, which she did not, the court had the discretion to grant summary judgment on the discrete issues of (a) whether Stokes, the driver, was negligent, and, if so, (b) whether his negligence was a substantial factor in bringing about the accident. Inasmuch as Stokes's negligence and the fact that it was a proximate cause are not disputed, the court properly exercised that discretion in granting summary judgment on these two issues.

Moreover, defendants have not demonstrated that further discovery could lead to "facts essential to justify opposition," warranting the denial of plaintiff's motion for summary judgment (*see* CPLR 3212(f); *Auerbach v Bennett*, 47 NY2d 619, 636 [1979]); *Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359, 361 [1995]). Because plaintiff and the nonparty witnesses have not been deposed, the court correctly denied the motion to the extent plaintiff sought summary judgment on the affirmative defense of her own culpable conduct (see *Gonzalez*, 83

AD3d at 419).

Accordingly, I would affirm the motion court's order to the extent it granted plaintiff's motion for summary judgment on the issue of liability only and directed that the trial on damages encompass the issue of plaintiff's comparative fault.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5518 Joseph Valenti, et al., 102427/08
Plaintiffs-Respondents,

-against-

Martin Camins, M.D., et al.,
Defendants-Appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard Ng of counsel), for appellants.

Godosky & Gentile, P.C., New York (Anthony P. Gentile of counsel), for respondents.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about November 3, 2010, which, insofar as appealed from as limited by the briefs, denied the branch of the motion of defendants, Martin Camins, M.D., and Mt. Sinai Medical Center, for summary judgment dismissing the medical malpractice cause of action, affirmed, without costs.

On April 11, 2006, defendant Dr. Martin Camins performed surgery upon plaintiff Joseph Valenti's cervical spine at defendant Mt. Sinai Medical Center. Plaintiff had previously been diagnosed with a disc herniation at the C4-C5 level with severe canal stenosis and spinal cord compression, degenerative changes with canal stenosis at the C5-C6 level as well as an increased signal at the T2 level of the spinal cord. These spinal abnormalities had caused plaintiff to experience numbness

and pain on the left side of his body, his face and his penis, and an inability to obtain an erection. During the surgery, defendant Dr. Camins performed cervical diskectomies at C4-C5 and C5-C6, and a C5 vertebrectomy with placement of a cervical cage and plate. Dr. Camins secured the plate by inserting two 13mm screws.

Two months after the surgery, plaintiff continued to feel some pain in the area of his throat. Dr. Camins ordered a follow-up X ray of plaintiff's cervical spine. The report interpreting the X ray was prepared by Dr. Michael Rothman on June 12, 2006, and stated that "[plaintiff] is soft tissue ACDF, plate and screw fixation from C4 through C7 with an intervening metallic cage and partial corpectomies at C5 and C6 . . . The superior screws overlie the inferior C4 vertebral body. The inferior screws appear to overlie the C6-7 disc space. The exact position is uncertain and correlation with CT scan is suggested." Three days later, Dr. Camins wrote a letter to Dr. Mahesh Chhabria, plaintiff's neurologist, which stated that "[o]n June 12, 2006, a routine cervical spine radiograph was performed to assess [plaintiff's] cervical spine hardware. It appears that at the C7 level the screws are backing out. In view of that, I have recommended that we take the patient to the operating room suite to re-position his plate and screws." The corrective surgery was

performed, in two stages, on June 27, 2006. The operative report for the first stage stated that "[a]fter the previously placed plate had been visualized, it was obvious that there was screw back out at the C7 level."

Plaintiff commenced this action seeking damages for medical malpractice and lack of informed consent. In his bill of particulars, plaintiff claimed that Dr. Camins was negligent in, inter alia, his "improper placement of orthopedic hardware." The bill did not specify where such hardware was allegedly improperly placed. At Dr. Camins' deposition, however, plaintiff's counsel asked him multiple questions about the fact that the X ray report from Dr. Rothman referred to the C7 level. Counsel also asked numerous questions about defendant's own letter to Dr. Chhabria, as well as the operative report regarding the first stage of the second surgery. Both of these documents indicated that there was a screw back out at the C7 level. Dr. Camins acknowledged the references to C7, but contended that this was a mistake, and that the documents should have stated C6.

Plaintiff also took the deposition of nonparty Dr. Harshpal Singh, who assisted Dr. Camins in the second surgery. Dr. Singh was asked a multitude of questions about the precise placement of the screws during the first surgery. He acknowledged that the operative report for the second surgery stated that a screw had

been placed at the C7 level. However, he also surmised that this was a typographical error because the operative report for the first surgery did not indicate that a screw had been placed there.

At the close of discovery, defendants moved for summary judgment. They supported the motion with the affirmation of Douglas Cohen, M.D., a spinal surgeon. Dr. Cohen reviewed the records regarding Camins's diagnosis of plaintiff and the two surgeries he performed on plaintiff. He opined that Dr. Camins properly obtained plaintiff's informed consent. He also stated that everything Camins had done was in accordance with good and accepted medical and surgical practice. Further, he asserted that screw back out is a well-known and accepted complication of cervical spinal fusion surgery that can occur even with proper surgical technique and appropriate selection and placement of a cervical plate and screws. Dr. Cohen did not discuss where Camins placed the screws and whether such placement necessitated the second surgery. However, he did state in a footnote that, according to Dr. Camins's deposition testimony, the reference to the C7 level in the operative report from the second surgery was a typographical error.

In opposition, plaintiff submitted the affirmation of an unidentified orthopedist. The orthopedist contended that Dr.

Camins's malpractice lay in his having placed a screw at the C7 level. He referred to Camins's own records to establish that a screw was placed there. The doctor did not make any reference to plaintiff's informed consent claim.

Defendants submitted a reply affirmation from Dr. Robert Schneider, a radiologist. Dr. Schneider averred that, contrary to the statement by plaintiff's expert, the C-7 vertebral body was not operated on during plaintiff's April 11, 2006 first surgery, as the lower cervical plate screw was positioned into the C-6 vertebral body and did not overlie the C6-C7 disc space. He annexed to his affirmation a copy of an X ray of plaintiff's cervical spine taken after plaintiff's first operation, which he interpreted as showing an anterior plate with screws at the C-4 and C-6 levels, and none at the C7 level. He opined that the screws were in good position without any evidence of displacement. Dr. Schneider also stated that a spinal X ray taken before the second surgery showed that the lower screws were secured into the C-6 vertebral body in the proper position, but had backed out.

The motion court denied defendants' motion for summary judgment. The court found that Dr. Cohen's affirmation was sufficient to make a prima facie showing of entitlement to summary dismissal of the malpractice claim. However, it also

determined that the affirmation of plaintiff's expert created an issue of fact by stating that there was evidence that a screw had been misplaced during the original surgery. The court rejected Dr. Schneider's reply affirmation as "new evidence," and accordingly refused to consider it. In any event, the court stated, defendants' reply only "underscore[d the] conflict" concerning the placement of screws. The court dismissed plaintiff's informed consent claim.

Defendants argue on appeal that plaintiff's theory of liability, based on Dr. Camins's having placed a screw in the wrong position, was raised for the first time in opposition to the summary judgment motion and took them by surprise. Defendants assert that the allegation in plaintiff's bill of particulars regarding the "improper placement of orthopedic hardware" was too vague to have placed them on notice that plaintiff believed that Dr. Camins inserted a screw at the wrong level of plaintiff's cervical spine. Accordingly, defendants contend, they had no choice but to submit Dr. Schneider's affirmation in reply, since they could not have done so when they submitted their moving papers.

We disagree. Plaintiff's bill of particulars, by itself, may have been too undefined to apprise defendants that plaintiff believed Dr. Camins to have committed malpractice by placing a

screw at the C7 level of the cervical spine. However, a party may raise even a completely unpleaded issue on summary judgment so long as the other party is not taken by surprise and does not suffer prejudice (*see Rosario v City of New York*, 261 AD2d 380 [1999] [permitting the defendant to move for summary judgment on basis of unpleaded defense]). Here, there was no surprise because the question of precisely where Dr. Camins originally placed the screws that backed out was clearly identified as an issue at the depositions of Dr. Camins and Dr. Singh. Plaintiff's counsel asked numerous questions at the depositions regarding the issue. For defendants to now argue that they did not consider the place where the backed-out screw was originally inserted to be a part of plaintiff's theory of liability is simply disingenuous. Indeed, in light of this, we depart from the motion court to the extent it found that defendants met their prima facie burden on their summary judgment motion. In order to have done so, defendants would have had to directly address each and every element of the claimed malpractice (*see Wasserman v Carella*, 307 AD2d 225, 226 [2003]). Since it was obvious, at the time defendants moved for summary judgment, that plaintiff believed Dr. Camins to have committed malpractice by placing a screw in the wrong place, the issue became part of defendants' prima facie burden. Because defendants did not address it, the

burden never shifted to plaintiff to raise an issue of fact.

In any event, defendants' own submissions in support of the motion for summary judgment establish that there are issues of fact precluding such relief. Three documents, two of them prepared by Dr. Camins himself, state clearly that a screw was placed at the C7 level. Defendants consistently attributed the references to C7 as "misstatements." This may be true. However, it raises a factual question that may only be resolved by a jury (*see Bradley v Soundview Healthcenter*, 4 AD3d 194 [2004]).

The dissent, in arguing that defendants could not have anticipated the theory advanced by plaintiff's expert in opposition to the summary judgment motion, focuses primarily on the pleadings. Again, the key is not what is in the pleadings, but whether the moving party was surprised or prejudiced (*see Rosario* at 380). The bill of particulars may not have specified how Dr. Camins engaged in the "improper placement of orthopedic hardware." However, by repeatedly questioning Dr. Camins at his deposition regarding the placement of a screw at the C7 level, plaintiff undoubtedly placed him on notice that the possible mislocation of the screw was a central concern that defendants would be required to address at the summary judgment stage. Accordingly, the dissent's reliance on *Feliciano v New York City Health & Hosps. Corp.* (62 AD3d 537 [2009]), in which the theory

of liability raised in opposition to summary judgment was, unlike here, truly “new,” is inapposite. Moreover, the dissent completely disregards the unavoidable fact that the record contains more than one statement from Dr. Camins himself that he placed a screw at a location which was not medically indicated.

Based on the foregoing, defendants were required to demonstrate affirmatively that the screw which backed out was not misplaced during the first surgery. This would have included, as part of their prima facie case, submitting the radiologist’s affirmation that was only first submitted in reply. Because defendants did not address the issue in their moving papers, the burden never shifted to plaintiff to submit evidence establishing the existence of an issue of fact. In any event, it cannot be ignored that the record contains more than one statement from Dr. Camins himself that he placed a screw at a location which was not medically indicated. At the very least, this discrepancy in the record creates an issue of fact that precludes summary judgment, and which could not have been cured by defendants’ submission in reply.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

Because I believe that the motion court erred in failing to consider evidence submitted by the defendants in reply, I must respectfully dissent. The defendants argue that the motion court erred by not considering the new evidence they submitted on reply - Dr. Schneider's affirmation and the April 12, 2006 Xray attached thereto - because the newly submitted evidence responded to arguments and a theory of liability first raised in the plaintiff's opposition papers. In my view, they are entirely correct. Moreover, contrary to the majority's view, the record clearly shows, as set forth more fully below, that the defendants were taken by "surprise" by the plaintiff's new claim that defendants committed malpractice by placing a screw at the C7 instead of the C6 level of the cervical spine. Thus, in my opinion, they were not obliged to address that issue in their moving papers.

"The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." Dannasch v. Bifulco, 184 A.D.2d 415, 417, 585 N.Y.S.2d 360, 362 (1st Dept. 1992). Courts have generally employed this rule "in the context of summary judgment motions to prevent a movant from remedying basic deficiencies in

its prima facie showing by submitting evidence in reply, thereby shifting to the non-moving party the burden of demonstrating the existence of a triable issue of fact at a time when that party has neither the obligation nor opportunity to respond." Matter of Kennelly v. Mobius Realty Holdings LLC, 33 A.D.3d 380, 381, 822 N.Y.S.2d 264, 266 (1st Dept. 2006); see also Sanford v. 27-29 W. 181st St. Assn., 300 A.D.2d 250, 251, 753 N.Y.S.2d 49, 51 (1st Dept. 2002).

In this case, the plaintiff's opposition to the summary judgment motion included a claim, raised for the first time in the affidavit of an orthopedic surgeon, that the defendants departed from the standard of care by placing a screw in the C-7 vertebral body instead of the appropriate C-6 vertebral body. The plaintiff argues that his claim that screws were improperly placed at the C-7 level was not raised for the first time in his opposition papers as his bill of particulars alleged that the defendants had improperly placed the orthopedic hardware during the initial operation. This is incorrect. In his bill of particulars, the plaintiff merely claimed that there was "improper placement of orthopedic hardware." This could mean anything from simple bad technique in inserting the screws and plates during the surgery to an entirely different claim of using the wrong hardware for the particular procedure.

Indeed, the majority concedes that the "[p]laintiff's bill of particulars . . . may have been too undefined to apprise defendants that plaintiff believed Dr. Camins to have committed malpractice by placing a screw at the C7 level." Our recent decision in Feliciano v. New York City Health & Hosps. Corp. (62 A.D.3d 537, 879 N.Y.S.2d 415 (1st Dept. 2009)), therefore mandates reversal here. See also Anderson v. Beth Israel Med. Ctr., 31 A.D.3d 284, 819 N.Y.S.2d 241 (1st Dept. 2006). In Feliciano, this Court concluded that the defendants' expert physician's affirmation, submitted in reply to the plaintiff's opposition, was appropriate because the defendants' arguments could not have been submitted at an earlier juncture due to the indefiniteness of the plaintiff's initial pleading. See Feliciano, 62 A.D.3d at 538, 879 N.Y.S.2d at 416.

Nevertheless, the majority holds that this claim was no "surprise" to the defendants because the issue was clearly identified at the depositions of Dr. Dr. Camins and Dr. Singh. Therefore, the majority concludes the defendants should have addressed the issue as part of their prima facie burden "[s]ince it was obvious, at the time [the] defendants moved for summary judgment, that [the] plaintiff believed Dr. Camins to have committed malpractice by placing a screw in the wrong place."

In my opinion, the record is devoid of any evidence that

would support such a conclusion. Instead, the majority's assumption begs the question of why the defendants would wait to supply the April 12 Xray and expert affidavit with their reply papers if it was truly "obvious" to them that the issue was placement of the screw at the C7 level.

Rather, what appears obvious in the deposition of nonparty Dr. Singh is that the April 12 Xray produced for his inspection settled the "numerous questions" asked as to the possible placement of the screws in the C7 vertebra during initial surgery. Dr. Singh's reply at deposition was unequivocal, and in the context of the questioning it is apparent that he -- and plaintiff's counsel -– believed the issue to be settled as follows:

"Q (plaintiff's counsel): "Can you tell me does that x-ray depict the hardware and screws that were placed by Dr. Dr. Camins [during the plaintiff's first surgery]?

"A: Yes.

"Q: Can you tell me what vertebral bodies are accommodating the screws as is depicted in that x-ray ?

"A: The C4 vertebral bodies [sic] is accommodating screws and the C6 vertebral body is accommodating screws."

After asking Dr. Singh to mark vertebra C1 on the Xray, plaintiff's counsel concluded the deposition. Similarly, the

transcript of Dr. Dr. Camins's deposition fails to show that the defendants were on notice of the plaintiff's claim. Rather, defendant Dr. Camins was made aware of an apparent discrepancy between his testimony and the radiologist's report (which alluded to placement of screws at C7, and placement to "overlie the C-6, C-7 disk space"). Defendant Dr. Camins dismissed this as a typographical error or inaccurate statement. He further testified repeatedly that he did not routinely use the word "overlie" so he could not explain what it meant for a screw to "overlie a space."

In any event, the record clearly supports the view that had the defendants believed that the plaintiff's malpractice claim alleged the misplacement of screws at C7 there would have been no reason whatsoever for the defendants not to produce the April 12 Xray and June 28, 2006 Xrays with their moving papers. Here, the fact that they did not do so can be clearly interpreted to mean that they were not on notice of the plaintiff's C-7 misplacement claim. Even a perfunctory comparison of the Xrays in the record shows that the screws were moved to the C7 level during the corrective surgery on June 28, 2006, and therefore production of the Xrays and the affidavit would have easily satisfied the defendants' prima facie burden in moving for summary judgment.

Thus, I believe that the motion court should be reversed and the matter remanded for reconsideration of the motion including the evidence submitted by defendants in reply.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6313 Ilona Orsos, Index 309754/09
Plaintiff-Appellant,

-against-

Hudson Transit Corp., et al.,
Defendants-Respondents.

Agoglia, Holland & Agoglia, P.C., Jericho (E. Kevin Agoglia of counsel), for appellant.

Gallo, Vitucci & Klar, New York (Yolanda L. Ayala of counsel), for respondents.

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered March 24, 2011, which granted defendants' motion to vacate the independent medical examination (IME) conducted by Dr. Andrew Hecht, and directed plaintiff to appear for another IME, affirmed, without costs.

"Pursuant to CPLR 3121, following the commencement of an action, if a plaintiff's physical condition is in controversy, the defendant may require the plaintiff to submit to a physical examination. Further, it is within the trial court's discretion to require a plaintiff to submit to more than one physical examination. However, the party seeking the examination must

demonstrate the necessity for it" (*Chaudhary v Gold*, 83 AD3d 477, 478 [2011] [internal citations omitted]; *Tucker v Bay Shore Stor. Warehouse, Inc.*, 69 AD3d 609 [2010]).

Plaintiff, in her affidavit in opposition to defendants' motion to vacate, states that defendants' designated physician, Dr. Hecht, upon completion of the examination, recommended that, once the litigation was over, she see his partner for follow-up care. This statement reflects potential bias on the part of the physician, which tainted his report of his findings. Accordingly, a second examination by a different physician is permissible to ensure that the focus of the medical testimony will be on the nature and extent of plaintiff's alleged injuries, rather than on any taint or irregularity in the first examination.

The dissent agrees that plaintiff should be directed to appear for another IME, but would find that the court abused its discretion in disallowing discovery of the IME conducted by Dr. Hecht. However, although CPLR 3121(b) and 22 NYCRR 202.17(c) provide that copies of the IME report shall be served on the other parties, the court has discretion to direct otherwise, and, under 22 NYCRR 202.17(j), any party may move to be relieved from

compliance. Here, the court did not improvidently exercise its discretion when it vacated the IME. Unlike *Comunale v Sealand Contrs. Corp.* (2 Misc 3d 672 [2003]), on which the dissent relies, this is not a case where a defendant, without justification, seeks to manipulate the system to avoid the production of an unfavorable IME report "simply by designating the doctor as a consultant or not having the doctor prepare a written report" (2 Misc 3d at 674).

The dissent also believes that Dr. Hecht's suggestion that plaintiff see his partner for follow-up care, while perhaps inappropriate, did not amount to bias. However, as the motion court found, Dr. Hecht's recommendation "gives rise to an *appearance* of self dealing, and partiality with resulting prejudice to the defendants' detriment" (emphasis added), which is all that is required to sustain the exercise of the court's discretion (*see Miocic v Winters*, 75 AD2d 887, 888 [1980]). In *Miocic,* defendant sought the re-examination of plaintiff by a different physician because the first physician was a close friend of plaintiff's counsel. Although the doctor maintained that the friendship would not color his opinion, the court found that "[n]o matter how objectively and thoroughly [the doctor]

might now act, such actions would necessarily be tainted with the appearance of bias and partiality" (*id.*). Here too, it cannot be determined to what extent, if any, Dr. Hecht's solicitation of plaintiff influenced his report or whether his independence was compromised.

All concur except Mazzarelli, J.P. and Manzanet-Daniels, J. who dissent in part in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting in part)

While I agree with the majority that the motion court appropriately exercised its discretion in directing plaintiff to appear for another independent medical examination (IME), I would find that the court abused its discretion in disallowing discovery of the report of the examination conducted by Dr. Andrew Hecht.

The majority does not dispute the proposition that the defense is obligated to turn over the report of an expert retained to conduct an IME of plaintiff. "[D]efendants who seek to invoke their right to a medical examination of plaintiff should not have the option of not providing plaintiff with a report of the IME simply by designating the doctor as a consultant or not having the doctor prepare a written report. Otherwise, a defendant could conduct an examination which is favorable to plaintiff and not produce it, thereby prejudicing plaintiff and simultaneously undermining the truth seeking function of a trial" (*Comunale v Sealand Contr. Corp*., 2 Misc 3d 672, 674 [2004], discussed in 150 Siegel's Prac. Rev. 4 [June 2004] [emphasis added]).

The majority nonetheless finds in this case that the mere "appearance" (not evidence) of bias trumps the normal rules of discovery. The majority endorses this departure from the

customary rules despite the fact that we cannot even ascertain whether Dr. Hecht was in fact tainted by bias because the motion court, inexplicably, failed to conduct an in camera review of Dr. Hecht's report so as to determine whether he was, indeed, unfairly biased as the defense claims. The majority contends that this is not a case where a defendant "seeks to manipulate the system to avoid the production of an unfavorable IME report"; however, it cannot be denied that the defense is nonetheless seizing on what is at most an inappropriate comment to avoid the production of what it perceives as a disadvantageous opinion rendered by the expert it initially designated to perform an IME. Further, the defense is disingenuously arguing that it was biased by the expert's having seen the actual footage of the accident giving rise to plaintiff's injuries.

In any event, the record evidence fails to support the conclusion that Dr. Hecht was biased. The record shows that on October 4, 2010, plaintiff, together with her attorney, appeared at the offices of Dr. Hecht, the physician designated by defendants to conduct an IME. Before examining plaintiff, Dr. Hecht asked her, as is customary during such examinations, to describe her medical history and the facts surrounding the accident. Plaintiff, in response to the doctor's request, described the pertinent facts of the accident. During the course

of this recitation, plaintiff advised Dr. Hecht that the accident had been captured on videotape. Dr. Hecht asked if he could see the tape, and plaintiff's counsel thereupon handed him the DVD. Dr. Hecht then left the examination room with the DVD and returned approximately 10 minutes later. Neither plaintiff nor her attorney was present while Dr. Hecht viewed the DVD, nor did either have a conversation with him afterward concerning his impressions of the footage. Upon his return, Dr. Hecht examined plaintiff and recommended that following the completion of this litigation she see his partner for follow-up care.

While this suggestion might be viewed as inappropriate, it was insufficient, in my view, to establish that Dr. Hecht's opinion was tainted by bias. There is no evidence that either plaintiff or her attorney attempted to influence Dr. Hecht's opinion; indeed, it was Dr. Hecht who asked to view the DVD of the accident. He then viewed the DVD alone, outside of the presence of plaintiff and her attorney.[1]

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[1]*Miocic v Winters* (75 AD2d 887 [1980]), relied on by the majority, is distinguishable inasmuch as the designated defense expert in *Miocic* enjoyed a "close personal friendship" with the plaintiff's counsel. The expert also allegedly revealed that he had "intense animosity" for defense counsel and was "unwilling[]" to assist in the preparation of the defendant's case (*id*.). Nothing in the record in this case indicates that plaintiff's counsel knew Dr. Hecht, let alone was a close friend of his, or that he exhibited "animosity" toward defense counsel.

Notably, the DVD of the accident viewed by the physician was produced by defendants during the course of discovery. Although so produced, the DVD evidently had not been provided to defendants' own physician, even though such evidence is of the type an expert would find valuable in rendering his or her own opinions. It is difficult to discern how it was improper for the expert to rely on accident footage in arriving at his opinions, and how doing so "tainted" his opinion and "obliterated his objectivity," as the defense asserts. Furthermore, there is no evidence whatsoever that plaintiff's counsel exercised "undue influence" over the examination. Indeed, nothing would prevent plaintiff, during a trial of this action, from showing defendants' expert the footage of the accident and cross-examining said expert's opinions in light of the actual accident footage.

In my opinion, this Court should not sanction this gamesmanship and evident attempt to subvert the truth-seeking function of the court. There is no contention that the DVD did not accurately depict the accident; indeed, the accident footage

was produced by defendants themselves. I would therefore order that defendants produce Dr. Hecht's report. I would find, however, that under the circumstances, defendants are entitled to designate an expert to conduct another IME of plaintiff.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Tom, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

7041-
7041A Index 100846/09

112 West 34th Street
Associates, LLC,
Plaintiff-Respondent,

-against-

112-1400 Trade Properties LLC,
Defendant-Appellant.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for respondent.

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 7, 2011, inter alia, permanently enjoining defendant from terminating the lease or otherwise interfering with plaintiff's possession of the leased premises based on the December 2, 2008 notice to cure, and declaring that plaintiff is not in default under or in breach of the lease, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 13, 2011, upon the parties' motions for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Under a 114-year triple net ground lease, dated June 10, 1963 and set to expire on June 10, 2077, defendant leased to plaintiff the land and 26-story commercial building located at

112-120 and 122 West 34th Street in Manhattan. The building, which has approximately 780,000 square feet of rentable space, was built in the 1950s and its original construction featured an aluminum and glass curtain wall system on all but the eastern facade, which had a masonry veneer wall with punched windows.

In 2006, plaintiff's managing agent reviewed the condition of the building and concluded that certain components were failing and had outlived their useful lives, and required repair or replacement. In 2007, plaintiff undertook a capital improvement program, which included, among other things, placing a new curtain wall over the old one, at a cost of approximately $16.5 million, the installation of a new canopy, and masonry work.

By notice to cure dated December 2, 2008, defendant advised plaintiff that it was in default under the terms of the lease, in that:

> "[i]n violation of Sections 9.01(a) and 9.01(b) of the Lease, you have made structural changes or alterations to the Demised Premises involving in the aggregate an estimated cost of more than one hundred thousand dollars ($100,000) (the 'Structural Alterations') without having obtained Lessor's prior written consent to such Structural Alterations and without having provided Lessor with ten days' written notice prior to undertaking such Structural Alterations."

The notice identified eight work items, including masonry work (items [a][i] through [v]), the new canopy (item [a][vi]),

adding a pre-fabricated shed on the roof of the building (item [a][vii]), and the new curtain wall (item [a][viii]). Defendant also alleged that plaintiff violated Sections 9.01(d) and (i) of the lease by making the structural alterations without either seeking or obtaining defendant's written approval of the project architects and/or engineers and cost estimates, and by failing to furnish a performance bond.

By summons and complaint dated January 22, 2009, plaintiff commenced this action, seeking a *Yellowstone* injunction (*see First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]), and a declaration that it was not in default under the lease. Plaintiff alleges that the challenged work is not structural and in any event falls within the ambit of Article 7 ("Repairs and Maintenance of Demised Premises") and Article 8 ("Compliance With Laws, Ordinances and Regulations"), neither of which requires the prior written consent of defendant. After granting a *Yellowstone* injunction, Supreme Court denied defendant's motion and granted plaintiff's cross motion for summary judgment. In so ruling, the court found that the interpretation of the term "structural change" presents a question of fact, and that the unrefuted affidavits of plaintiff's four experts established that the challenged work was not structural. We now affirm.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations" (*Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 861 [2007]).

"A lease, like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties" (*Farrell Lines v City of New York*, 30 NY2d 76, 82 [1972]). "Courts are obliged to interpret a [lease] so as to give meaning to all of its terms" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [2004] [internal quotation marks omitted]). If inconsistent clauses exist, they will be reconciled if possible and the intent of the parties enforced as expressed in the lease (*see National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969]). Further, "[i]t is well settled that no additional liability or requirement will be imposed upon a tenant by interpretation unless it is clearly within the provisions of the instrument under which it is claimed" (*67 Wall St. Co. v Franklin Nat. Bank*, 37 NY2d 245, 249 [1975]).

Here, the clear intention of the parties, evidenced by the

language of Articles 7 and 8 of the commercial triple net lease, was to transfer to plaintiff net lessee all responsibility for inspection, maintenance and repair of the building.

Section 7.01 of the lease obligates plaintiff to perform "all necessary repairs [to the Demised Premises], interior and exterior, structural and non-structural, ordinary and extraordinary or radical, foreseen and unforeseen." Section 7.02 provides that the "necessity for and adequacy of repairs . . . shall be measured by the standard which is appropriate for buildings of similar construction and class, provided that Lessee shall in any event make all repairs necessary to avoid any structural damage or injury to the Building." Section 7.04 provides that defendant will not be required to make any repairs or alterations of any kind and that plaintiff "assumes the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the Demised Premises." Section 7.05 provides that any dispute over the standard of care and maintenance shall be determined by arbitration in accordance with Article 26.

Section 8.01 of the lease obligates plaintiff to remove all violations and to:

> "comply with all present and future laws, ordinances, orders, rules, regulations and requirements of all federal, state and municipal governments, courts,

> departments, commissions, boards and officers, any national or Local Board of Fire Underwriters, or any other body now or hereafter exercising functions similar to those of any of the foregoing, radical, foreseen or unforeseen, ordinary as well as extraordinary, which may be applicable to the Demised Premises or any part thereof, . . . whether or not any such law, ordinance, rule, regulation or requirement shall necessitate radical structural changes, additions or improvements, or the removal of any structure, encroachments or projections, ornamental or structural, on, to or over the streets adjacent to the Demised Premises, or on, to or over property contiguous or adjacent thereto."

Neither Article 7 or Article 8 states that the lessee must notify or obtain the lessor's consent before performing structural work required by it. The only instance where notice and the lessor's prior consent to structural work is required is found in Article 9, "Changes, Alterations and New Construction by Lessee."

Under Section 9.01, "Lessee shall have the right at any time and from time to time during the term hereof to make, at its sole cost and expense, changes and alterations in, to or of the Building," provided, in pertinent part:

> "(a) No structural change or alteration involving in the aggregate an estimated cost of more than ONE HUNDRED THOUSAND DOLLARS ($100,000) shall be undertaken except after ten days prior written notice to Lessor.
>
> "(b) No structural change or alteration, involving in the aggregate an estimated cost of more than ONE HUNDRED THOUSAND DOLLARS ($100,000), including any such change or alteration in connection with any restoration required by Articles 15 or 16 hereof, but excluding

> tenant changes in connection with the leasing of space in the Building, shall be made without the prior written consent of Lessor, which consent Lessor shall not unreasonably withhold.
>
> . . .
>
> "(d) Any structural change or alteration, other than tenant changes to be made to be made in connection with the leasing of space in the Building, involving in the aggregate an estimated cost of more than ONE HUNDRED THOUSAND DOLLARS ($100,000) shall be conducted under the supervision of a licensed architect or a licensed professional engineer selected by Lessee and approved in writing by Lessor (which approval Lessor shall not unreasonably withhold), and no such structural change or alteration shall be made except in accordance with detailed plans and specifications and cost estimates prepared and approved in writing by such architect or engineer and approved in writing by Lessor (which approval Lessor shall not unreasonably withhold).
>
> . . .
>
> "(i) If the estimated cost of any such structural change or alteration shall in the aggregate be in excess of ONE HUNDRED THOUSAND DOLLARS ($100,000), Lessee shall, before commencement of work, at Lessee's sole cost and expense, furnish to Lessor a surety company performance bond . . ."

In contrast to Article 7 and 8, which impose an *obligation* on plaintiff to make structural changes and alterations where necessary for maintenance, repair or compliance with the law, Article 9 addresses plaintiff's *right* to make structural changes and alterations to the building where it chooses, but is not obligated, to do so. Article 9 makes no reference to either Article 7 or Article 8, and its requirement of consent and notice

does not apply to work undertaken pursuant to Articles 7 or 8, neither of which states that notice to or consent of the lessor must be obtained before the work is done. Thus, the clear meaning of the lease, read as a whole, is that notice to, and consent of, the lessor is required only with respect to work that (1) constitutes a structural change or alteration to the building; (2) costs more than $100,000 in the aggregate; and (3) is not a repair, or required to comply with the law, or a tenant change in connection with the leasing of space.

Defendant argues that whether work is structural or not presents a question of law, not fact, and that, notwithstanding the opinions of plaintiff's four experts, the masonry work and installation of the curtain wall, canopy, and a new entranceway were structural alterations under the well settled legal definition of that term, which encompasses a change to "a vital and substantial portion of the premises, [that] would change its characteristic appearance" and is "extraordinary in scope and effect, or unusual in expenditure" (*see Wall Nut Prod. v Radar Cent. Corp.*, 20 AD2d 125, 126-127 [1963]; *see also Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 400 [1984]; *Riverside Research Inst. v KMGA, Inc.*, 108 AD2d 365, 369 [1985], *affd* 68 NY2d 689 [1986]). However, "what will constitute a structural alteration necessarily depends upon the facts of each

case and requires that the nature and extent of the proposed repair or alteration be examined in the context of and in relationship to the structure itself" (*Garrow v Smith*, 198 AD2d 622, 623 [1993]; *see also Excell Assoc. v Excelsior 57th Corp.*, 2011 NY Slip Op 32117[U] [Sup Ct, NY County 2011]).

Here, plaintiff's unrefuted expert testimony establishes that the structure of a building is its "load bearing skeleton," which means its "foundation, floor slabs, beams and columns" (*see also* Administrative Code of City of NY § 27-585), and that "a structural change or alteration" is one that would "alter or change the Building's skeleton or impact on its integrity." The experts opined that the masonry repairs made to a parapet wall and non-weight-bearing brickwork (work items [a][i] through [a][v]) were not structural repairs (*see also Bertsch v Small Invests., Inc.*, 73 A2d 346, 348 [NJ 1950] [removal or replacement of a parapet "could affect only slightly the general appearance of the edifice"]). The experts did not regard the construction of a steel canopy (work item [a][vi]) in front of the building as a structural change since the non-weight-bearing canopy "simply hangs from the building." The cases that defendant relies on to support its contention as to the canopy are distinguishable (*see e.g. Two Guys*, 63 NY2d at 400 [extending existing sign canopy required piercing waterproofing membrane of roof]). The roof

shed work (work item [a][vii]) was never done.

All four of plaintiff's experts stated that the recladding of the curtain wall (work item [a][viii]) was not a structural change (*see* New York City Building Code § 1402.1 [Administrative Code of City of NY § 1402.1] [defining a curtain wall as "a non-load bearing building wall, in skeleton frame construction attached and supported to the structure at every floor or other periodic locations. Assemblies may include glass, metal, precast concrete or masonry elements arranged so as not to exert common action underload and to move independently of each other and the supporting structure"]; *see also Village of Cross Keys, Inc. v United States Gypsum Co.*, 556 A2d 1126, 1128 [Md 1989] ["A curtain wall is not a part of the structural skeleton of the building"]; *United States v Aluminum Co. of Am.*, 233 F Supp 718, 723 [D Mo 1964], *affd* 382 US 12 [1965] [curtain wall "keeps out the elements and lets in light, and is attached to the structural framework of a building"]). As the facade, it could be removed without affecting the building's structural integrity.

Defendant failed to rebut plaintiff's showing that the challenged work was not structural. Defendant essentially argues that the work was structural because it was extensive and expensive and changed the appearance of the building. However, as plaintiff argues, this ignores the length of the lease, the

value of the lease and the related value of the work, the parties' understanding of how the premises were to be repaired and maintained, and whether the conduct of the work will upset the reasonable expectations of the landlord as to the condition of the premises that will revert back to it at the end of the tenancy. The new curtain wall replaced the existing curtain wall and updated, but did not change, the building's characteristic appearance, the fundamental purpose of its erection, or its contemplated uses. While defendant claims that plaintiff undertook an "$80 million top-to-bottom capital improvement program at the Building," the work items raised in the notice to cure were estimated to cost no more than $22 million, which must be viewed in the context of a 26-story, 780,000-square-foot building that costs approximately that amount to maintain each year. Nor does the mere fact that plaintiff hired structural engineers to determine the weight load and whether the building could bear the new curtain wall render the work structural.

Given our finding that the challenged work was not structural, we need not consider plaintiff's alternative argument that the work is governed by Articles 7 and 8 of the lease and therefore did not require the landlord's prior consent.

Defendant's arguments as to work items that were not included in the notice to cure, such as the alleged new entranceway, will not be considered (*see Chinatown Apts. v Chu Cho Lam*, 51 NY2d 786, 787-788 [1980]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Renwick, Richter, Abdus-Salaam, JJ.

7145-
7146 Index 400357/11

Patricia Monroy,
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents.

McDermott Will & Emery LLP, New York (Lauren E. Handel of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondents.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 4, 2011, which denied plaintiff's motion for a preliminary injunction, unanimously affirmed, without costs. Order, same court and Justice, entered May 31, 2011, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to the extent of declaring that 34 RCNY 4-08(h)(8) applies to the sale of food, and otherwise affirmed, without costs.

In this action, plaintiff food truck vendor seeks declaratory and other relief in connection with defendants' enforcement against her of 34 RCNY 4-08(h)(8) which provides that "[n]o peddler, vendor, hawker or huckster shall park a vehicle at a metered parking space for purposes of displaying, selling,

storing or offering merchandise for sale from the vehicle." Plaintiff concedes that the term "merchandise" may include food but maintains that the term, as used in the regulation, does not apply to food. While certain city regulations, such as those relating to licensing, distinguish between "food vendors" (see Admin. Code § 17-306 *et seq*.) and "general vendors" (see Admin. Code § 20-452 *et seq*.), there is no reason for the Department of Transportation, in enacting its parking regulations, to distinguish between different classes of vendor.

Contrary to plaintiff's assertion, the regulation of metered parking is within the scope of the Department of Transportation's authority (*see* NY City Charter § 2093). Unlike in *Good Humor Corp. v City of New York* (290 NY 312 [1943]), upon which plaintiff relies, the regulation at issue here does not prohibit all street vending, it merely regulates the ability to vend from metered parking spaces.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7568 Richard Blatt, Index 109595/07
Plaintiff-Appellant,

-against-

Touchstone Television Productions, LLC,
Defendant-Respondent.

_____

Kiley, Kiley & Kiley, PLLC, Great Neck (James D. Kiley of counsel), for appellant.

London Fischer LLP, New York (Virginia Futterman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about September 23, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of this personal injury action was proper, since defendant purchaser of commercial plate glass from plaintiff's company demonstrated that it owed no duty of care to plaintiff. Regardless of whether it was foreseeable that plaintiff might be injured loading the glass onto the truck defendant sent to pick it up, given the arm's-length relationship of a buyer and seller of goods, and defendant's contractual undertaking with the union whereby only union members were to load or unload the truck, there was no basis to find a duty of care owed to plaintiff (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 289

[2001] ["(a)bsent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm"]). Moreover, plaintiff's volunteering to load the heavy glass onto the truck, without the participation or instruction from defendant's employees, severed any causal connection between negligence on the part of defendant and the accident (*see Pouso v City of New York*, 22 AD3d 395, 396 [2005]; *Murray v New York City Hous. Auth.*, 269 AD2d 288 [2000]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7569 In re Carleto A.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for presentment agency.

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Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 11, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted grand larceny in the fourth degree, and placed him on enhanced supervision probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and imposing a period of enhanced supervision probation. This disposition, which was recommended by the Department of Probation, was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Appellant committed the underlying offense

in an aggressive manner, his academic and attendance record at school was poor, he was in need of substance abuse counseling, and his supervision at home was inadequate.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7570-
7570A Index 107414/09

Marcell Cooke,
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Ronald J. Katter, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 8, 2011, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion to compel discovery, unanimously modified, on the law, to deny defendant's motion, without prejudice to renewal upon completion of discovery, and to grant so much of plaintiff's cross motion as sought records relating to the maintenance, inspection and repair of the access plate and post-accident records, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 31, 2011, which, upon reargument, adhered to its original determination, unanimously dismissed, without costs, as academic.

Plaintiff alleges that, on June 6, 2008, she suffered injuries in a trip and fall, caused by a hole created by the

height differential between a metal access plate and the surrounding roadway, at a Manhattan crosswalk. On July 29, 2008, plaintiff served a notice of claim on the City of New York, which, inter alia, described defendant's negligence as consisting of "their failure to maintain and repair [the] access plate and adjacent roadway which created a dangerous and hazardous condition . . . and/or in the negligent repair." The foregoing language sufficiently apprised defendant that plaintiff was alleging affirmative negligence and that defendant created and caused the condition, and enabled defendant to investigate the claim (*see* General Municipal Law § 50-e[2]; *Brown v City of New York*, 95 NY2d 389, 393 [2000]). Plaintiff's "cause and create" and "affirmative negligence" theories were amplified in her complaint and bill of particulars and did not present new theories of liability (*see Jackson v New York City Tr. Auth.*, 30 AD3d 289, 291-292 [2006]).

In light of the outstanding discovery noted above, the grant of summary judgment dismissal was premature (*see* CPLR 3212[f]). Additionally, as defendant refused to admit ownership of the access plate, plaintiff is entitled to records of post-accident

repairs of the access plate and immediately surrounding roadway, in order to enable her to ascertain defendant's ownership and/or control (*see Fernandez v Higdon El. Co.*, 220 AD2d 293 [1995]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7571 William Glazier, et al., Index 103482/10
Plaintiffs-Respondents,

–against–

Lyndon Harris, et al.,
Defendants-Appellants,

Robert A. Rimbo, et al.,
Defendants.

Satterlee Stephens Burke & Burke LLP, New York (James Doty of counsel), for appellants.

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 1, 2011, which, to the extent appealed from, denied defendants Lyndon Harris, Lee Wesley, and St. John's Lutheran Church's motion to dismiss the causes of action for defamation as against them, unanimously modified, on the law, to grant the motion as to Wesley, and otherwise affirmed, without costs.

The complaint states a cause of action for defamation as against defendants Harris and St. John's Lutheran Church since it is pleaded with the required specificity (CPLR 3016[a]), identifying "the particular words that were said, who said them and who heard them, when the speaker said them, and where the

words were spoken" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48 [2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]). That every alleged defamatory statement set forth in the complaint is not enclosed in quotation marks does not, without more, render the complaint defective (*see Moreira-Brown v City of New York*, 71 AD3d 530 [2010]).

The challenged statements are actionable as "mixed opinions," since they imply that the opinions are based upon facts unknown to the church council members who heard the statements (*see Guerrero v Carva*, 10 AD3d 105, 112 [2004]). In the context of the entire publication, the unmistakable import of Harris's statements is that plaintiffs engaged in inappropriate conduct, essentially amounting to exerting undue influence over a parishioner and stealing from the church, and accordingly cannot be trusted.

The alleged defamatory statements constitute slander per se, since they impugn plaintiffs' reputations in their trade, business or profession, and therefore special damages need not be alleged or proven (*see Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]).

The complaint fails, however, to state a cause of action for defamation as against Wesley, since it does not set forth "*in haec verba* the particular defamatory words claimed to have been

uttered by [him]" (*see Gardner v Alexander Rent-A-Car*, 28 AD2d 667 [1967]). The only allegedly defamatory statements attributed to Wesley are that "he had been present with defendant[] Harris, during [a] visit to Ms. Lilli Jaffe's residence," and that "plaintiffs had been visiting Ms. Jaffe and taking care of her to the exclusion of other parties such as himself." Neither of these statements is actionable. Plaintiffs otherwise allege that Wesley "confirmed" Harris's statements to the council members at the retreat. Contrary to plaintiffs' contention, there is no basis for waiting for discovery to learn the particular words that they failed to plead (*see BCRE 230 Riverside LLC v Fuchs*, 59 AD3d 282, 283 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7572 People of the State of New York, etc., Petitioner-Appellant, Index 400837/10

-against-

Tempur-Pedic International, Inc., Respondent-Respondent.

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Eric T. Schneiderman, Attorney General, New York (Steven C. Wu of counsel), for appellant.

Bingham McCutchen, LLP, Boston, MA (William N. Berkowitz of the bar of the state of Massachusetts, admitted pro hac vice, of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered January 20, 2011, which denied the Office of the Attorney General's (OAG) petition seeking to enjoin Tempur-Pedic's alleged "price-fixing" practices, prohibit Tempur-Pedic from destroying its records, compel Tempur-Pedic to disgorge its profits, and provide restitution to its consumers; granted Tempur-Pedic's motion to dismiss the petition; and denied Tempur-Pedic's discovery motion as moot, unanimously affirmed, without costs.

Following a complaint from a consumer, OAG launched an investigation that culminated in the instant petition, which alleged that Tempur-Pedic violated General Business Law § 369-a by entering Resale Price Maintenance agreements (RPM) with its

retailers, setting the price of their products at an artificially high rate.

The motion court, in denying the petition and granting Tempur-Pedic's motion to dismiss, first found that General Business Law § 369-a does not make RPMs illegal as a matter of law. We agree. The plain language of § 369-a is dispositive of this argument, as it states that "contract provisions" that impose minimum resale prices "will not be enforceable or actionable at law." This statutory language makes clear that an action may not be maintained in a court of law to enforce such a provision. However, there is nothing in the text to declare those contract provisions to be illegal or unlawful; rather the statute provides that such provisions are simply unenforceable in the courts of this state (*see e.g. WorldHomeCenter.com, Inc. v Franke Consumer Prods.*, 2011 WL 2565284, 2011 US Dist LEXIS 67798 [SD NY 2011]; *WorldHomeCenter.com, Inc. v KWC Am., Inc.*, 2011 WL 4352390, 2011 US Dist LEXIS 104496 [SD NY 2011]).

Even if the plain language of General Business Law § 369-a could be held to render RPMs illegal as a matter of law, the OAG failed to adduce sufficient evidence to support its petition against Tempur-Pedic. First, we note that the IAS court followed the proper standard in evaluating the petition for summary disposition and Tempur-Pedic's motion to dismiss (*see e.g. Matter*

of National Enters., Inc. v Clermont Farm Corp., 46 AD3d 1180, 1183 [2007]).

Here, the OAG relies on, as evidence of the existence of an RPM, Tempur-Pedic's "Retail Partner Obligations and Advertising Policies," which, admittedly are signed by Tempur-Pedic and its retailers. However, this agreement pertains to advertising only. Advertising agreements cannot be the subject of a vertical RPM claim, because they do not restrain resale prices, but merely restrict advertising (*see e.g. WorldHomeCenter.com, Inc*., 2011 WL 4352390 at *5-*6, 2011 US Dist LEXIS 104496 at *14-*15).

In any event, the evidence OAG tendered did not support a conclusion that RPM agreements were reached between Tempur-Pedic and its retailers, but merely that Tempur-Pedic enacted its minimum price policy and that its retailers independently determined to acquiesce to the pricing scheme in order to continue carrying Tempur-Pedic's products (*see e.g. Leegin Creative Leather Prods., Inc. v PSKS, Inc*., 551 US 877, 901-902

[2007]; *Monsanto Co. v Spray-Rite Serv. Corp.*, 465 US 752, 764 [1984]).

We have considered the remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7573 Marcelino Kassiano, et al., Index 308735/10
Plaintiffs-Appellants,

-against-

Palm Management Corporation, et al.,
Defendants-Respondents.

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Thomas D. Wilson, P.C., Brooklyn (Thomas D. Wilson of counsel), for appellants.

Carroll, McNulty & Kull LLC, New York (Emilio F. Grillo of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 1, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to vacate an order which, upon plaintiffs' default, granted defendants' motion for leave to amend their answer to assert a defense based on the exclusivity provisions of the Workers' Compensation Law and to dismiss the complaint based on that defense, unanimously affirmed, without costs.

A plaintiff seeking to vacate a default in responding to a motion to dismiss pursuant to CPLR 5015(a)(1) must proffer both a reasonable excuse for the default and a meritorious cause of action (*see Brown v Suggs*, 38 AD3d 329, 330 [2007]). "Law office failure may constitute a reasonable excuse for a default" (*Goodwin v New York City Hous. Auth.*, 78 AD3d 550, 551 [2010];

see CPLR 2005).

However, on the merits, defendants' motion was supported by evidence showing that plaintiff Marcelino Kassiano was injured during the course of his employment by Palm West Corporation, that he actually received workers' compensation benefits, and that the other Palm defendants are part of a single integrated corporation for purposes of the Workers' Compensation Law (*see Carty v East 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529 [2011]; *Paulino v Lifecare Transp.*, 57 AD3d 319 [2008]). In support of their motion to vacate, plaintiffs offered no basis for finding that their claims are not barred by Workers' Compensation Law § 11.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7574-
7574A The People of the State of New York, Respondent,

Ind. 484/08
1841/08

-against-

George Pena,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgments, Supreme Court, New York County (John Cataldo, J. at suppression hearing; Richard Carruthers, J. at plea and sentencing), rendered January 5, 2010, as amended January 6, 2010, convicting defendant of three counts of robbery in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 16 years, unanimously affirmed.

The court properly denied defendant's motion to suppress lineup identifications. These identifications were not suppressible as products of an unlawful search and seizure.

The police department had probable cause to arrest defendant for a robbery, based on a photo identification. The arresting officers had seen a photograph of defendant and were aware the person in the photo was wanted for the robbery. While conducting

a vertical patrol, these officers went to an apartment in response to a noise complaint. The officers had no reason to believe defendant was in the apartment.

The officers entered with the consent of an occupant, but then entered a bedroom without consent, got defendant out of bed, and asked him for identification. The officers then recognized defendant as the person wanted for a robbery and arrested him.

Even assuming that the police had no lawful basis for entering the bedroom or asking defendant for identification, the exclusionary rule did not require suppression of the lineup identifications (*see People v Jones,* 2 NY3d 235, 243-245 [2004]). At the time of the lineups, defendant was in lawful custody based on probable cause to believe he committed a robbery. At most, it was "only the means of effecting the arrest that [were] unlawful, not the detention itself" (*id*. at 243).

Defendant argues that the arresting officers did not have probable cause until after they engaged in unlawful conduct, and thereby learned that defendant was wanted for robbery. However, there was already probable cause from the time defendant was identified from photographs. The only fruit of the police conduct at issue was defendant's identity as a person for whose arrest there was preexisting probable cause (*see People v Pleasant*, 54 NY2d 972, 973-974 [1981]). "The . . . identity of a

defendant . . . is never itself suppressible as a fruit of an unlawful arrest" (*INS v Lopez-Mendoza*, 468 US 1032, 1039 [1984]).

The court properly denied defendant's motion to suppress physical evidence recovered from a subsequent search of defendant's apartment pursuant to a valid search warrant. While the warrant did not authorize a nighttime search (*see* CPL 690.30[2]), the search was lawful because it was commenced before 9:00 P.M., even though it extended past that time (*see People v Vara*, 117 AD2d 1013 [1986]). We have considered and rejected defendant's remaining arguments concerning this issue.

The sentencing court properly denied defendant's motion to withdraw his guilty plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Defendant and his new counsel received a sufficient opportunity to present their arguments, which the court properly rejected (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes that the plea was knowing, intelligent, and voluntary (*see People v Fiumfreddo*, 82 NY2d 536,

543 [1995]), and that defendant did not establish a legal basis for withdrawing his plea.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7575 Michael Thompson, et al., Index 106770/07
Plaintiffs-Appellants,

-against-

BFP 300 Madison II, LLC, et al.,
Defendants-Respondents.

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for appellants.

Malapero & Prisco, LLP, New York (George Mahoney of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 2, 2011, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the causes of action pursuant to Labor Law § 200 and § 241(6) and for common-law negligence, unanimously affirmed, without costs.

Plaintiff injured his hand while moving a large fan coil box, which he did without the assistance of others. The court properly dismissed the Labor Law § 200 and common-law negligence claims as against all defendants, since plaintiff's injury was caused not by a dangerous condition on the work site, but by the method or manner in which he chose to accomplish the task of moving the object (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 908-909

[2011]). Moreover, the record demonstrates that defendants exercised no supervision or control over plaintiff's work (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]).

The Labor Law § 241(6) claim was also properly dismissed. The Industrial Code provisions on which plaintiffs relied involved tripping hazards (12 NYCRR 23-1.7[e]), sharp objects (*id.*), and material piles (12 NYCRR 23-2.1[a]), and were inapplicable to this case (*see Waitkus v Metropolitan Hous. Partners*, 50 AD3d 260 [2008]; *Castillo v Starrett City*, 4 AD3d 320, 321 [2004]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7577 In re Israel Sexton, Index 110467/09
Petitioner,

-against-

Raymond W. Kelly, etc., et al.,
Respondents.

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The Quinn Law Firm, White Plains (Andrew C. Quinn of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

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Determination of respondent Raymond W. Kelly, as Police Commissioner of the City of New York, dated March 25, 2009, approving the finding, after a hearing, that petitioner was guilty of failing to notify the Police Commissioner and/or the Legal Bureau of respondent Police Department that he intended to provide character testimony, and did in fact provide testimony, at a trial, and imposing a forfeiture penalty of 15 vacation days, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan A. Madden, J.], entered November 9, 2010), dismissed, without costs.

Regardless of whether the proceeding was properly transferred pursuant to CPLR 7804(g), this Court retains jurisdiction in the interest of judicial economy (*see e.g. Matter of Whyte v Horn*, 38 AD3d 362 [2007]).

The Commissioner's determination — that, pursuant to the Police Department's Patrol Guide Procedure No. 211-09, petitioner was required to give notice of his intention to testify at his cousin's criminal trial, and that he failed to do so — was rational and supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]; *see also Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]). The Assistant Deputy Commissioner of Trials had a rational basis for finding that petitioner testified in his "official" capacity at the criminal trial, given that he referred to his job as a Police Department Sergeant and the judge in the case referred to him as "Sergeant." The Assistant Deputy Commissioner also had a rational basis for finding that, even if petitioner did not testify in his "official capacity," Patrol Guide Procedure No. 211-09 still applied because petitioner conceded that it was his

understanding that he was going to provide character testimony, among other things.

We have considered petitioner's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7580 Josh Segal, etc., et al., Index 102768/07
Plaintiffs-Respondents,

-against-

Paul Cooper, et al.,
Defendants-Appellants.

_____

Mark L. Lubelsky & Associates, New York (Mark L. Lubelsky of counsel), for appellants.

Michael T. Sucher, Brooklyn, for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 28, 2011, which denied defendants' motion for summary judgment dismissing the amended complaint, unanimously modified, on the law, to grant the motion as to the third and sixth causes of action, and otherwise affirmed, without costs.

The court properly declined to dismiss plaintiff Segal's breach of contract claim. It is true that "[a] contract cannot be implied in fact . . . where there is an express contract covering the subject-matter involved" (*Miller v Schloss*, 218 NY 400, 406-407 [1916] [emphasis deleted]). However, the Operating Agreement of Lighthouse Retail Partners L.L.C., which later became plaintiff Lighthouse Real Estate Advisors, LLC (LREA), and the contract alleged in the amended complaint cover different subject matter. Defendants' arguments that there was no breach

of contract and that Segal suffered no damages were considered and rejected on a prior appeal (*see* 49 AD3d 467 [2008]).

Dismissal of Segal's fraud claim was also not warranted. As can be seen from his deposition testimony and his affidavit in opposition to defendants' motion, this claim is not based solely on the statements that defendant Cooper allegedly made at a December 2002 meeting; rather, it is also based on the individual defendants' words and conduct after that date. For example, Segal testified that the individual defendants represented that LREA had exclusive rights to market the properties at issue. He also said Cooper told him that he (Cooper) was acting as a representative of LREA when he met with the party that ultimately entered into the leases. These are factual statements, as opposed to mere expressions of future intent.

Although Segal's deposition testimony shows that he did not rely on the alleged misrepresentation (that LREA had an exclusive brokerage agreement for the properties at issue) when he entered into the business transaction with defendants, he was not asked whether he would have continued to work for LREA for three years if he had known that defendant Lighthouse Real Estate Management, LLC (LREM) had the exclusive brokerage. Segal was entitled to rely on his fellow LLC members' statements and actions after LREA was formed (*see Frame v Maynard*, 83 AD3d 599, 602 [2011];

Andersen v Weinroth, 48 AD3d 121, 136 [2007]; *Brunetti v Musallam*, 11 AD3d 280, 281 [2004]).

The motion court properly declined to dismiss Segal's unjust enrichment claim. Unjust enrichment is a quasi-contract claim and "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, however, LREA's Operating Agreement covers a different subject matter than Segal's unjust enrichment claim.

The record confirms the allegations of the complaint that Segal bestowed a benefit on defendants (*see Segal*, 49 AD3d at 467). However, the record does not demonstrate what benefit LREA, as opposed to Segal, conferred on defendants. Therefore, we dismiss LREA's unjust enrichment claim (sixth cause of action) (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119 [1998]).

Defendants' argument that the original complaint admitted that they "duly earned" the commissions at issue is unavailing; the original complaint was superseded by the amended complaint (*see e.g. Baker v 16 Sutton Place Apt. Corp.*, 2 AD3d 119 [2003]).

LREA's conversion claim (third cause of action) should have been dismissed because LREA did not have a possessory right or

interest in the commissions (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). In opposition to defendants' summary judgment motion, Segal admitted that LREM, rather than LREA, had the exclusive brokerage agreement. Therefore, LREA had no right to commissions unless it actually procured a lease (*see Parker Realty Group, Inc. v Petigny*, 14 NY3d 864, 866 [2010]).

The motion court properly declined to dismiss the breach of fiduciary duty claims. It is true that the Operating Agreement states, "The Managers are authorized to manage the affairs of the Company in conjunction with the Managers' other business interests and activities, which may be . . . in direct competition with the business of the Company" and "Any Member may engage in any other business ventures or activities which may be . . . in direct competition with the business of the Company." However, Segal testified that the whole basis of LREA's business

was an exclusive agreement to market the properties at issue. Thus, by diverting the exclusive brokerage agreement from LREA to LREM, defendants thwarted the very purpose for which LREA was formed (*see Pappas v Tzolis*, 87 AD3d 889, 892-893 [2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7581 The People of the State of New York, Ind. 4606/10
Respondent,

-against-

Martin Ross,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Elizabeth Mosher of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about March 15, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MAY 8, 2012

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7582 In re Akiva Katz, Index 106092/11
Petitioner-Appellant,

-against-

New York University,
Respondent-Respondent.

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Zalkind, Rodriguez, Lunt, & Duncan LLP, Boston, MA (Harvey A. Silverglate of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), for appellant.

Office of General Counsel, New York (Nancy Kilson of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered November 16, 2011, which denied a petition pursuant to article 78 to annul a determination by respondent (NYU), dated on or about October 22, 2010, directing that petitioner receive an "F" grade in General Physics I and withdraw from the course, and dismissed the proceeding, unanimously affirmed, without costs.

The court properly found that NYU's disciplinary determination was based on a rational interpretation of the relevant evidence and substantially adhered to its published administrative rules and procedures (*see generally Matter of Katz v Board of Regents of the Univ. of the State of N.Y.*, 85 AD3d 1277 [2011], *lv denied* 17 NY3d 716 [2011]; *see also Matter of*

Dequito v New School for Gen. Studies, 68 AD3d 559 [2009]). NYU's Academic Integrity Policy (AIP) for its College of Arts and Sciences expressly provided that all outside materials used in laboratory reports be accurately and completely acknowledged, and that any determination as to plagiarism would be based on fact, not upon a student's intention. As such, given the documentary evidence supporting NYU's determination, petitioner's argument, that he had no intention to plagiarize and that he only sought to rely upon prior student laboratory reports as guidance to properly draft a laboratory report, is unavailing. The AIP also explicitly provided that if any student had doubts as to the requirements for acknowledging outside sources when drafting laboratory reports, the student was to confer with his or her professor on the issue, which petitioner did not do.

Finally, the determination to assign petitioner an "F" as a grade, as well as to require his withdrawal from the course, was

within the parameters of permissible discipline authorized by the AIP, and such discipline was not shocking to one's sense of fairness under the circumstances.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7583 Filiberto Eustaquio, et al., Index 400313/10
Plaintiffs-Respondents,

-against-

860 Cortlandt Holdings, Inc., et al.,
Defendants-Appellants.

Rubin, Fiorella & Friedman LLP, New York (Shelley R. Halber of counsel), for appellants.

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered September 21, 2011, which granted plaintiff's motion for partial summary judgement on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff met his prima facie burden by submitting his deposition testimony and affidavit showing that he fell from a ladder that was not properly secured or equipped with adequate safety devices (*see e.g. Granillo v Donna Karen Co.*, 17 AD3d 531, 531 [2005], *lv dismissed in part, denied in part* 5 NY3d 878 [2005]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [2004]).

Defendants' evidence was insufficient to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his injuries. The sworn statement of the foreman of plaintiff's nonparty employer, prepared by a private investigator

during an investigation of plaintiff's claim, was inadmissible. While the statement and the investigator's affidavit state that the foreman's daughter had translated the statement from Greek to English, the statement was not accompanied by an attestation from the daughter setting forth her qualifications and the accuracy of the translation (*see* CPLR 2101[b]; Reyes *v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2011]). The deposition testimony of the president of plaintiff's employer was insufficient to show that plaintiff was recalcitrant in failing to secure the ladder with a rope before using it, as the president had no personal knowledge of the accident or the condition of the ladder at the time of the accident (*see Madalinski v Structure-Tone, Inc.*, 47 AD3d 687, 688 [2008]; *Kyle v City of New York*, 268 AD2d 192 [2000], *lv denied* 97 NY2d 608 [2002]). Defendants failed to preserve their argument that plaintiff was recalcitrant in choosing to use the unsecured ladder instead of an interior staircase, and we decline to review it. In any event, the argument is unavailing, as there is no evidence in the record indicating that the workers had permission to use the internal stairway, or that the use of the ladder to access or leave the roof constituted a misuse of the device (*cf. Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554-555 [2006]). Rather, the evidence shows that plaintiff and the other workers were instructed to use the ladder to access the roof (*cf.*

Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39-40 [2004]). Insofar as defendants argue that harnesses were available at the job site, the evidence does not show that the workers were expected to, or instructed to, use a harness while ascending or descending a ladder (*see Auriemma v Biltmore Theatre, LLC.*, 82 AD3d 1, 10 [2011]; *Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]). Indeed, the general contractor's field supervisor and the president of plaintiff's employer both testified that harnesses were not needed for the roofing work, given the existence of a parapet wall around the roof.

We have reviewed defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7584 Yolanda Gonzalez, Index 100065/09
Plaintiff-Respondent,

-against-

Club Monaco U.S., LLC, et al.,
Defendants-Appellants.

Law Office of Charles J. Siegel, New York (Richard D. O'Connell of counsel), for Club Monaco U.S., LLC, appellant.

Torino & Bernstein, P.C., Mineola (Thomas B. Hayn of counsel), for Extell Belnord, LLC, appellant.

Ephrem J. Wertenteil, New York, for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 5, 2011, which, in an action for personal injuries sustained when plaintiff tripped and fell while exiting defendant Club Monaco US LLC's store, denied defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to establish their entitlement to judgment as a matter of law. The photographs submitted by defendants depict a sizable irregularity on the outermost edge of a top step and fail to show that the defect at issue was trivial as a matter of law (*see Abreu v New York City Hous. Auth.*, 61 AD3d 420 [2009]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165 [2000]). Although it is possible that the defect has no

appreciable depth, that cannot be conclusively determined from the photographs, and there is no other evidence of record in that regard (*see Rivas v Crotona Estates Hous. Dev. Fund Co., Inc.*, 74 AD3d 541 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7585 In re Kuba Brown, as President of Local 94-94A-94B, etc., Petitioner-Appellant, Index 115251/10

-against-

John C. Liu, etc., Respondent-Respondent.

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Service Employee International Union Local 32BJ, Amicus Curiae.

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Pitta & Giblin LLP, New York (Jane Lauer Barker of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

Office of the General Counsel, Service Employees International Union, New York (Andrew L. Strom of counsel), for amicus curiae.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered March 30, 2011, granting respondents' cross motion to dismiss the petition brought pursuant to CPLR article 78, which sought, inter alia, to direct respondent Comptroller to conduct an investigation of the wage complaints filed by certain members of Local 94, unanimously affirmed, without costs.

The court correctly determined that the union members, the custodian-helpers, were not entitled to the prevailing wage and benefits protection under Labor Law article 9. Under the

"indirect system" of custodial care, the New York City Department of Education (DOE) employs custodian-engineers in accordance with civil service regulations, who in turn may employ custodian-helpers (*see generally Matter of Conlin v Aiello*, 64 AD2d 921 [1978], *affd* 49 NY2d 713 [1980]). The terms of the custodian-engineers' employment are set forth in the collective bargaining agreement between their union and the DOE. Thus, since custodian-engineers are employees of the DOE, they are not "contractors," and custodian-helpers are not their "building service employees," as those terms are defined in Labor Law § 230 *et seq*.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 8, 2012

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Freedman, JJ.

7586 In re Remiguel Sanchez, Ind. 1741/11
[M-5057] Petitioner,

-against-

Hon. Charles H. Solomon, etc., et al.,
Respondents.

Ernest H. Hammer, New York, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Charles H. Solomon, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Megan McDonald of counsel), for District Attorney, respondent.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: MAY 8, 2012

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Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

7645 ONA 510 Mezz Holdings LLC, Index 600878/10
Plaintiff-Appellant,

-against-

510 Loan Funding LLC, et al.,
Defendants-Respondents,

53rd Street & Madison Tower Mezz, LLC,
Defendant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 22, 2010,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated on or about April 24, 2012,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 8, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6586 David O'Neill, Index 651322/10
Plaintiff-Petitioner-Appellant,

-against-

New York University, et al.,
Defendants-Respondents-Respondents.

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Vladeck, Waldman, Elias & Engelhard, P.C., New York (Debra L. Raskin of counsel), for appellant.

Seyfarth Shaw LLP, New York (Edward Cerasia II of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered July 29, 2011, reversed, on the law, without costs, the judgment vacated, and the first, second, fourth and fifth causes of action, reinstated.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
John W. Sweeny, Jr.
Karla Moskowitz
Dianne T. Renwick
Helen E. Freedman, JJ.

6586
Index 651322/10

_____x

David O'Neill,
Plaintiff-Petitioner-Appellant,

-against-

New York University, et al.,
Defendants-Respondents-Respondents.

_____x

Plaintiff-petitioner appeals from an order and judgment (one paper) of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 29, 2011, which denied the petition seeking, inter alia, to vacate respondents' termination of his employment, and dismissing this hybrid plenary action and CPLR article 78 proceeding pursuant to CPLR 3211(a)(1) and (7).

Vladeck, Waldman, Elias & Engelhard, P.C., New York (Debra L. Raskin and Liane T. Rice of counsel), for appellant.

Seyfarth Shaw LLP, New York (Edward Cerasia II and Aaron Warshaw of counsel), for respondents.

MOSKOWITZ, J.

In this appeal, plaintiff-petitioner (petitioner), a research scientist, alleges that he reported suspected research misconduct of a colleague to his superiors who, in turn, fired him in retaliation. The motion court denied his petition to vacate respondents' termination of his employment and dismissed this hybrid plenary action and CPLR Article 78 proceeding pursuant to CPLR 3211(a)(1) and (7). We unanimously modify to reinstate the causes of action based on retaliation and failure to follow disciplinary procedures.

According to the complaint, in July 2002, respondents New York University, NYU Hospitals Center and NYU Langone Medical Center (NYU) hired petitioner Dr. David O'Neill as a non-tenured, full-time faculty member, with an annual starting salary of $140,000 pursuant to an offer letter. NYU's Faculty Handbook provided that appointment to non-tenured faculty positions "shall be for a definite period of time, not exceeding one academic year unless otherwise specified."

NYU renewed petitioner's appointment annually. As recently as February 23, 2010, NYU confirmed his appointment for the 2009-2010 academic year from September 1, 2009 through August 31, 2010 in a renewal letter. The offer letter provided that petitioner's appointment with NYU was "contingent upon continued employment in

good standing with the [NYU] School of Medicine and compliance with all University and School of Medicine rules and regulations and other contractual obligations."

These rules and regulations included NYU's Faculty Handbook, containing its Code of Ethical Conduct (the NYU Code of Ethics) and policies related to research misconduct (the Research Misconduct Policies), and the NYU Langone Medical Center Code of Conduct (NYU Code of Conduct), containing its Non-Intimidation/Non-Retaliation Policy (the Non-Retaliation Policy).

The NYU Code of Ethics states that "[e]ach member of the University is expected to uphold the standards of [NYU] and to report suspected violations of the Code or any other apparent irregularity." The Research Misconduct Policies define "research misconduct" as including "fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results." The NYU Code of Conduct elucidates as follows: "Every member of the Medical Center has an obligation to report situations or activities that are – or even seem to be – violations of the Code. If something concerns you but you are not sure whether it is a violation of the Code, you must raise the concern and ask for advice." The Non-Retaliation Policy states that "[t]he Medical Center promises that there will be no retaliation against you if you raise concerns or questions about

misconduct or report violations of this Code."

The Faculty Handbook also contains NYU's disciplinary policies that include its General Disciplinary Regulations Applicable to both Tenured and Non-Tenured Faculty Members and the Faculty Grievance Procedures. The Disciplinary Regulations apply "where a question arises concerning an alleged violation by any member of the faculty of a rule or regulation of [NYU]" and specify whether the dean or a faculty committee addresses each question. The Grievance Procedures provide a mechanism for NYU faculty members to "seek redress of their grievances."

Petitioner's appointment with NYU included his duties as Assistant Director of the Vaccine/Cell Manipulation Core Laboratory for the NYU Cancer Institute or the Vaccine Lab. His supervisor was Dr. Nina Bhardwaj. She reported to Dr. William Carroll, the Director of the Cancer Institute. In 2004 and 2005, petitioner oversaw the construction of the Vaccine Lab. The lab's first major project was a clinical trial, that Bhardwaj designed, comparing a new and relatively expensive "dentritic cell" vaccine for malignant melanoma (skin cancer) with an inexpensive, decades-old mineral oil "Montanide" vaccine. The research team included petitioner and Bhardwaj as well as other staff members. Bhardwaj was the co-inventor and patent holder of the dendritic cell vaccine. The clinical trial also required the

research team to write and submit a research paper to a scientific journal. Bhardwaj named petitioner as lead author of the paper.

It is undisputed that the clinical trial results showed that the dendritic cell vaccine was less effective than the Montanide vaccine. Throughout the clinical trial and for months thereafter, the research team exchanged e-mails and letters and held conferences on the clinical study. During this time, petitioner believed that Bhardwaj was attempting to shape the written and oral presentation of the clinical trial results in an unethical manner to downplay and distort the negative findings about the dendritic cell vaccine.

In March 2009, the American Society of Clinical Oncology (ASCO) invited petitioner to present the results of the clinical trial at its June 2009 meeting. Although ASCO's rules require that the lead author present, Bhardwaj demanded that she present. Despite this, petitioner presented. Carroll thereafter recommended petitioner for an additional appointment and praised his work in the Vaccine Lab.

By August 2009, petitioner had drafted the research paper. Bhardwaj reviewed the paper and altered its findings to the extent of allegedly eliminating some raw data and supplying a different statistical analysis to minimize the differing

performance results between the two vaccines. Petitioner believed that Bhardwaj's actions constituted research misconduct. Thus, he e-mailed Carroll and the co-authors of the research paper, stating that the new analyses were "flawed and misleading and therefore invalid."

On October 29, 2009, in a meeting with Carroll and Lauren Hackett, an NYU administrator, petitioner distributed and read aloud a prepared statement that outlined his concerns over Bhardwaj's actions. Petitioner asserted that during this time, the promotion his supervisors had recommended a year earlier had stalled. On November 19, 2009, in another meeting with Hackett, Carroll handed petitioner a letter, stating that petitioner's "lingering . . . anger" impeded progress in the Vaccine Lab. Carroll cited petitioner's concerns over the research paper's new analyses as one example of a barrier to progress. The letter warned that petitioner's "[f]ailure to immediately rectify and sustain an acceptable level of behavior may lead to further disciplinary action including termination of [his] employment."

Petitioner typically arranged tours of the Vaccine Lab for outside visitors. However, in April, 2010, Bhardwaj arranged a tour. During the tour, petitioner intervened and took over from Bhardwaj. Petitioner then e-mailed Bhardwaj, advising that she first contact him with regard to any future site visits. On

April 22, 2010, Carroll learned of petitioner's e-mail and telephoned him, stating that Bhardwaj was not obligated to pre-arrange lab site visits with him. The conversation became heated. Petitioner acknowledged that he intermittently raised his voice but did so to keep from being interrupted. He asserted that the only time he raised his voice to Carroll was during this brief telephone call.

On April 23, 2010, petitioner met with Associate Dean David Levy and continued to press his concerns about Bhardwaj's actions and what he perceived as Carroll's retaliation. Levy advised petitioner to consult Dr. Steven Abramson, Vice Dean for Faculty and Academic Affairs, to file a grievance.

On the morning of May 3, 2010, petitioner requested an appointment with Abramson to begin the grievance process. That afternoon, Carroll called petitioner to a meeting and handed him a termination letter. The termination letter, dated April 25, 2010, dismissed petitioner, "effective immediately," for alleged "unprofessional behavior." The cited behavior was that, during the April 22 telephone call with Carroll, petitioner's "tone became very argumentative" and his "voice rose in anger."

On May 7, 2010, petitioner met with Abramson and requested to appeal his termination and file a grievance. Petitioner reiterated his concerns regarding Bhardwaj, Carroll's retaliation

and NYU's failure to follow its disciplinary policies. Petitioner then retained counsel. Thereafter, Dr. Reginald Odom, NYU's Vice President for Medical Center Employee and Labor Relations, periodically responded to counsel's e-mails and telephone calls. However, on July 13, 2010, Odom advised petitioner's counsel that NYU would not conduct an investigation or appeal, and that NYU maintained its termination decision. In August 2010, petitioner commenced this hybrid plenary action/Article 78 proceeding by filing a petition, summons and verified complaint. He asserted five causes of action: (1) breach of contract by retaliation for reporting research misconduct; (2) breach of contract by failure to follow disciplinary policies; (3) defamation; (4) arbitrary, capricious and unlawful actions contrary to the ethical conduct policies; and (5) arbitrary, capricious and unlawful actions contrary to the disciplinary policies.

In October 2010, NYU moved to dismiss the petition and complaint pursuant to CPLR 3211(a)(1) and (7). NYU argued that petitioner did not characterize his complaints about Bhardwaj as research misconduct until the commencement of this lawsuit. NYU contended that it thoroughly investigated petitioner's research misconduct concerns and determined that the challenged research findings constituted a mere difference of opinion. NYU further

argued that petitioner's claims failed because he did not allege detrimental reliance on NYU's non-retaliatory policies. NYU contended that it followed all relevant procedures before making a reasonable determination to discharge petitioner as an at-will employee based on his unprofessional behavior.

Petitioner opposed the motion, relying upon the allegations in his verified complaint and documentary evidence of, inter alia, NYU's policies and promises not to retaliate against individuals who reported research misconduct. In his pleadings, petitioner did not specifically allege that he relied upon NYU's non-retaliatory provisions when he reported Bhardwaj's suspected research misconduct.

By order entered July 29, 2011, the motion court granted NYU's motion to dismiss pursuant to CPLR 3211(a)(1) and (7). The court was not persuaded by petitioner's argument that NYU appointed him to a fixed, one-year employment term or that NYU could terminate him only for cause. Referring only to the offer letter and not the renewal letter, the court held that NYU appointed petitioner as a non-tenured faculty member with an unspecified employment period. The court rejected petitioner's argument that, by referencing the NYU Faculty Handbook, it could find a definitive term of employment (*Lobosco v New York Tele. Co.*, 96 NY2d 312, 317 [2001] ["[r]outinely issued employee

manuals, handbooks and policy statements should not lightly be converted into binding employment contracts"]). The court noted that, in *Slue v New York University Center* (409 F Supp 2d 349 [SD NY 2006]), an NYU "pharmacy aide," who alleged wrongful discharge and breach of contract, had unsuccessfully argued that various NYU manuals and handbooks, including the Faculty Handbook, indicated an employment contract for a fixed duration. The motion court opined that petitioner was an at-will employee, as the court found in *Slue*.

Citing *Lobosco* (96 NY2d 312), the court further noted that, even if a contract period is not of definite duration, a plaintiff may still maintain an action for breach of contract if "the employer made its employee aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment." The court observed that other courts have strictly applied the criteria set forth in *Weiner v McGraw-Hill, Inc.* (57 NY2d 458 [1982]) in determining whether an exception to the at-will arrangement applies when the employment term is indefinite. Specifically, the court noted that the *Weiner* court looked to whether there was an express provision in an employee handbook stating that employers could terminate employees only for cause, whether the employer also orally assured the employee that there

would be no termination without just cause and whether the employee turned down other employment opportunities in reliance upon the assurances.

Thus, the motion court reasoned that petitioner's first and second causes of action failed because no basis existed for finding that "NYU breached an employment contract with [petitioner] by terminating him without just cause." The court stated that petitioner's fourth and fifth causes of action, based upon the same claims in the first and second causes of action, also warranted dismissal. The court noted that case law had limited the role of courts in the review of controversies involving academic institutions where the exercise of highly specialized professional judgments are at issue. The court concluded that NYU's decision to terminate petitioner for unprofessional behavior was not arbitrary and capricious or shocking to the conscience.

The court also dismissed petitioner's third cause of action, for defamation, holding that Carroll's alleged defamatory words (i.e., that petitioner was inappropriately "angry," and exhibited "hostility" and "unprofessional conduct") constituted non-actionable expressions of opinion, as opposed to assertions of fact. The court held that, even assuming it viewed the challenged comments as fact, rather than opinion, they fall

within a qualified privilege and are not actionable, as the *Slue* court found. The court discussed that, while petitioner was correct to state that he could rebut a qualified privilege with proof that the challenged statements were false or uttered with actual malice or reckless disregard to their truth or falsity, petitioner failed to submit the required proof.

Breach of Contract

Petitioner argues that his employment relationship with NYU was not at-will, but that NYU hired him for a fixed term. He further argues that NYU's policies contained express contractual promises, thus, creating binding limitations on NYU's right to terminate. He contends that factual issues exist regarding his reliance on these limitations mitigating against an at-will employment arrangement. We find merit to these arguments.

Petitioner argues that the renewal letter, "confirm[ing]" his employment "for the academic year 2009-10," combined with the Faculty Handbook, stating that non-tenured faculty appointments "shall be for a definite period of time, not exceeding one academic year, unless otherwise specified," created employment for a definite one-year period, warranting termination only for good cause. This issue requires examination of the terms of the renewal letter and whether we should interpret it in conjunction with the general terms of the Faculty Handbook that address non-

tenure appointment renewals.

The Court of Appeals has noted a "two step" analysis in determining the issue of whether an employment arrangement is at-will: "(1) if the duration is definite, the at-will doctrine is inapplicable, on the other hand, (2) if the employment term is indefinite or undefined, the rebuttable at-will presumption is operative and other factors come into the equation" (*Rooney v Tyson*, 91 NY2d 685, 689 [1998]). The *Rooney* court, in answering a question the Second Circuit certified, advised that the "definiteness aspect" of an alleged fixed duration contract must be "resolve[d] . . . first" (*id.* at 689-690 [citations omitted]). The Court held that an oral contract between plaintiff trainer and defendant boxer for the plaintiff to continue as trainer "for as long as the boxer fights professionally" supported "a definite duration finding" (*id.* at 693). The Court reasoned that "[o]nly when we discern no term of some definiteness or no express limitation does the analysis switch over to the rebuttable presumption line of cases. . . . The agreement in this case is not silent [as to duration] and manifestly provides a sufficiently limiting framework" (*id.* at 690).

In *Lichtman v Estrin* (282 AD2d 326 [2001]), relying on *Rooney*, this court held that an agreement between the plaintiff and defendant law firm that the plaintiff would continue to work

at the law firm until a potential suspension determination and, thereafter, during the period of any suspension, at an annual salary of $80,000 plus benefits, amounted to an employment contract for a definite period, as opposed to an at-will employment arrangement.

Here, we hold that NYU's letters renewing petitioner's employment over specific academic years (including the offer letter and the renewal letter), read in conjunction with the non-tenure hiring provision in the Faculty Handbook, evidence an employment arrangement for a fixed duration, sufficient to overcome the motion to dismiss (*see e.g. Rooney*, 91 NY2d at 690; *Lichtman*, 282 AD2d 326).

Indeed, the renewal letter "confirm[ed]" his "status as a member of the faculty of [NYU's] School of Medicine for the academic year 2009-10." The Faculty Handbook provides that appointments to non-tenured positions, as in petitioner's case, "shall be for a definite period of time, not exceeding one academic year." The Faculty Handbook also states that renewed appointments would "automatically terminate" after a year unless NYU further renewed the appointment. In instances where employers have allowed renewable annual contracts to expire and the employee to continue working, courts have construed the new arrangement between the parties as at-will (*see e.g. Wood v Long*

Is. Pipe Supply, Inc., 82 AD3d 1088 [2011]). Here, however, when NYU terminated petitioner in April 2010, he was in the middle of his 2009-2010 appointment term.

The motion court erred in relying on *Lobosco* (96 NY2d at 317 ["(r)outinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment contracts"]). Indeed, the manual at issue in *Lobosco*, in contrast to the NYU Faculty Handbook here, expressly disclaimed that it constituted a contract: "This Code of Conduct is not a contract of employment and does not create any contractual rights of any kind between [defendant] and its employees."

While petitioner did not specifically plead NYU's breach of an employment agreement with a fixed duration, he did argue the point in opposition to NYU's pre-answer motion to dismiss and the court directly addressed his argument. Accordingly, as NYU cannot now claim prejudice, we conform the pleadings to the documentary evidence and arguments raised before the motion court (*see* CPLR 3025[c]; *see generally Fisher v City of New York*, 48 AD3d 303, 304 [2008]; *Matter of Denton*, 6 AD3d 531 [2004], *lv denied* 5 NY3d 714 [2005] ["Th(e) court may, sua sponte, relieve a petitioner of the failure to amend a pleading by deeming it amended to conform to the evidence presented () where, as here,

it would not result in prejudice to the opposing party"]).

In its decision, the motion court cited as "compelling" *Slue v New York University Medical Center* (409 F Supp 2d 349 [SD NY 2006]). In *Slue*, NYU terminated the plaintiff from his position as a non-tenured faculty member. The plaintiff then sued NYU for failing to follow the disciplinary policies in the Faculty Handbook. The court found that the Faculty Handbook, including its disciplinary policies, created no limitation on NYU's right to discharge the plaintiff, an at-will employee (409 F Supp 2d at 357-362). However, the *Slue* court did conclude that those disciplinary policies were applicable where, as here, a non-tenured faculty member allegedly violated a university rule or regulation. Thus, *Slue* is inapposite because, there, NYU terminated the plaintiff not for violating a university rule, but rather for inappropriate conduct in his private medical photography practice operated in an office on NYU property. Further, in contrast to *Slue*, NYU's initial offer of employment to petitioner was contingent on his compliance with University and School of Medicine rules and regulations that required reporting of research misconduct and suspected violations of the Code of Conduct as well as NYU's non-retaliation policy.

Petitioner alleges that he reported his concerns about suspected research misconduct to his co-authors, Carroll,

Hackett, Abramson, Keisha Lightbourne, the Director of Research Compliance, Levy and Odom. He further alleges that NYU denied him the dispute resolution and Grievance Procedures that the rules mandate for faculty accused of violating university rules. And, NYU did not attempt to counter petitioner's allegations by documenting its requisite disciplinary policies. Accordingly, the second cause of action for breach of contract for NYU's failure to follow its disciplinary policies is reinstated (*see Felsen v Sol Café Mfg. Corp.*, 24 NY2d 682, 685-686 [1969] [holding that once a fixed term contract is established, the burden shifts to the employer to show cause for dismissal]).

Because we find petitioner has pleaded an employment arrangement for a fixed duration, analysis of the at-will doctrine is unnecessary (*see Rooney*, 91 NY2d at 689). Nevertheless, we also hold that petitioner, for purposes of a motion to dismiss, has sufficiently stated that NYU's rules and regulations contained an express limitation on its right to discharge him on an at-will basis. The motion court held otherwise, opining that petitioner failed to allege detrimental reliance upon the express limitation at the time he reported Bhardwaj's suspected research misconduct.

In New York, it is well settled that "'where an employment is for an indefinite term it is presumed to be a hiring at will

which may be freely terminated by either party at any time for any reason or even for no reason'" (*Weider v Skala*, 80 NY2d 628, 633 [1992], quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 300 [1983]). An employee may rebut this presumption if he demonstrates that his employer made him aware of an "express written policy limiting the employer's right of discharge" and that the employee relied upon that policy to his detriment (*De Petris v Union Settlement Assn.*, 86 NY2d 406, 410 [1995], citing *Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 456-466 [1982]).

In *Weiner*, the Court of Appeals held that an employer's express promise limiting its ability to discharge an employee at-will could create an enforceable contract. There, the plaintiff stated a cause of action for breach of contract when he alleged that he relied upon his employer's oral assurances that it would terminate him only for cause, the employment application and the company handbook contained the same policy, he turned down offers of employment in reliance on this assurance and supervisors advised him to be careful when discharging other employees because the company would discharge them only for cause, in accordance with the handbook (57 NY2d at 465-466).

The Court of Appeals recognized a further limited implied-in-law exception to at-will employment, in *Weider*, where the employee, an attorney, had a duty to report unethical behavior

that was “at the very core and, indeed, the only purpose of his association with [the] defendants” (80 NY2d at 635). In the past, we have declined to extend the *Weider* exception beyond the “unique characteristics of the legal profession” (*Mulder v Donaldson, Lufkin & Jenrette*, 208 AD2d 301, 306-307 [1995]). However, in *Mulder*, we recognized the “potential for a cause of action for breach of express contract based upon a provision in the defendant’s employment manual which specifically provided that an employee who reports wrongdoing ‘will be protected against reprisals’” (*Sullivan v Harnisch*, 81 AD3d 117, 124 [2010], quoting *Mulder*, at 307).

Citing *Mulder*, petitioner argues that language in NYU’s rules and regulations, promising to protect employees who obey the requirement to report suspected research misconduct, amounts to an express limitation of the at-will employment rule. Petitioner asserts that NYU alerted him to its policies when he accepted employment, by stating in the offer letter that his continued employment was contingent on his compliance with those policies. NYU also required him and all Medical Center employees to pass a test on its conduct policies.

The motion court held that petitioner’s claim fails because his pleadings contained no allegation that he was induced to leave his previous employment or turned down other offers of

employment in reliance upon NYU's policies. However, this court has previously noted that "*Weiner* should not be interpreted as limiting its holding to its specific facts, especially in light of the court's formulation of a 'totality of circumstances' test" (*Lapidus v New York City Ch. of the N.Y. State Assn. for Retarded Children*, 118 AD2d 122, 126 [1986], quoting *Weiner*, 57 NY2d at 467). Moreover, in *Mulder*, where the defendant employer argued that the plaintiff's allegations did not fit within *Weiner*, we stated:

> "[T]his argument simply seeks to portray a factual pattern present in *Weiner* as a governing principle of law. The salient and necessary prerequisite of law, set forth in *Weiner*, which is met here, is the *reliance* alleged by the plaintiff. While plaintiff did not leave another job, he did aggressively pursue the true facts [about alleged company wrongdoing] upon the express written promise of the employer that there would be no retribution for reports of violations"

(208 AD2d at 307-308; *see also Marfia v T.C. Ziraat Bankasi*, 147 F3d 83, 89 [2d Cir 1998] ["The absence of the talismanic phrase 'I relied upon the Manual' does not, however, by itself preclude a reasonable jury from weighing the evidence presented and concluding that [plaintiff] relied upon the Manual"]).

Here, the NYU Code of Ethics, the Code of Conduct, the Non-Retaliation Policy and the Research Misconduct Policies, in combination, include NYU's express promise that it will protect employees from reprisal for reporting suspected research

misconduct. Thus, we can infer petitioner's reliance on NYU's policies, given the complaint's allegations of his compliance with those policies by reporting his concerns of suspected research misconduct. At this early stage of the litigation, these allegations are sufficient.

For the foregoing reasons, the first cause of action, for breach of contract based on retaliation, is reinstated.

Defamation

A claim for defamation must allege a "'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*'" (*Salvatore v Kumar*, 45 AD3d 560, 563 [2007], *lv denied* 10 NY3d 703 [2008], quoting *Dillon v City of New York*, 261 AD2d 34, 38 [1999]). "Even though a statement is defamatory, there exists a qualified privilege where the communication is made to persons who have some common interest in the subject matter" (*Foster v Churchill*, 87 NY2d 744, 751 [1996]). The plaintiff may overcome this qualified privilege with allegations that the defendant made the defamatory statement with malice or reckless disregard for the truth or falsity of the statement (*Loughry v Lincoln First Bank*, 67 NY2d 369, 376 [1986]).

Petitioner argues that his pleadings sufficiently allege that Carroll made defamatory remarks, including that petitioner exhibited "anger," "hostility," "unprofessional behavior," "a lingering element of anger and frustration" that was "clearly impeding [his] ability to effectively direct the Vaccine [lab]," and that he had been terminated on account of his "unprofessional conduct." He further argues that he has sufficiently pled malice by asserting that the "defamatory statements were part of a campaign of harassment in retaliation" for his reporting of research misconduct (*Pezhman v City of New York*, 29 AD3d 164, 169 [2006]). Petitioner alleges that Carroll's statements were false. He further alleges that the date Carroll made the challenged statements, less than two weeks after he alerted Carroll and Hackett to Bhardwaj's suspected research misconduct, shows that Carroll made the remarks with actual malice.

Here, it is apparent that the challenged statements Carroll made to petitioner were communications regarding a work related common interest (*see Pitcock v Kasowitz, Benson, Torres & Friedman LLP*, 74 AD3d 613 2010, citing *Brian v Richardson*, 87 NY2d 46 [1995]). Thus, the challenged statements fall within the qualified privilege (*Foster*, 87 NY2d at 751). The complaint fails to overcome this privilege because it contains no more than conclusory allegations of malice, far from the "campaign of

harassment" described by the court in *Pezhman* (29 AD3d at 169). Accordingly, the motion court correctly dismissed this claim.

Article 78

Petitioner argues that the motion court applied the wrong standard in denying and dismissing his Article 78 petition.

"A disciplined or terminated employee may seek Article 78 review to determine whether the employer contravened any of its own rules or regulations" (*Matter of Hanchard v Facilities Development Corporation*, 85 NY2d 638, 641-642 [1995] [citation omitted]). The standard of review is whether the employer "substantially abided by its own policies in terminating petitioner's employment" (*id.* at 642).

Consistent with the parallel contract causes of action discussed above, petitioner has sufficiently alleged that NYU's conduct was arbitrary and capricious when it violated its own rules and regulations by summarily dismissing him during his one-year, fixed appointment term without cause. Moreover, the motion court erred in relying upon *Mass v Cornell University* (94 NY2d 87 [1999]). Although *Mass* noted that courts retain a limited role in reviewing "highly specialized" academic judgments, that kind of action is not at issue in this case. Rather, petitioner's allegations concern NYU's failure to follow its conduct and disciplinary policies and not any "highly specialized" judgment

associated with the research he and his colleagues were conducting in the Vaccine Lab.

Accordingly, the order and judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered July 29, 2011, denying the petition seeking, inter alia, to vacate respondents' termination of petitioner's employment, and dismissing this hybrid plenary action and CPLR article 78 proceeding pursuant to CPLR 3211(a)(1) and (7), should be reversed, on the law, without costs, the judgment vacated, and the first, second, fourth and fifth causes of action reinstated.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED:

CLERK